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83 - 1642

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

U. S. ELECTRICAL MOTORS,
A DIVISION OF EMERSON ELECTRIC CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARNOLD E. PERL
RICHARD M. KOBDISH*
YOUNG & PERL, P.C.
Suite 2380
One Commerce Square
Memphis, Tennessee 38103
(901) 525-2761

Attorneys For Petitioner,
U.S. Electrical Motors,
A Division of Emerson
Electric Co.

**Counsel of record*

QUESTION PRESENTED

Whether the Courts of Appeals have jurisdiction to review an order of the National Labor Relations Board setting aside a contested representation election and ordering a second election, when said order is based upon identical conduct found to be unfair labor practices by the Board, and where the Board's unfair labor practice order is before the Courts of Appeals upon either a Petition for Review or a Petition for Enforcement?

CORPORATION LIST

Petitioner, U.S. Electrical Motors, is a Division of Emerson Electric Company.

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28 U.S.C. §1245(1) 2

National Labor Relations Act, as amended, 29 U.S.C. §§151 *et seq.*:

§8(a)(1) 3
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§10(f) 4, 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, U.S. Electrical Motors, a Division of Emerson Electric Co. (hereinafter "Petitioner," "the Company," or "the Employer") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit herein is reported at 722 F.2d 315 (6th Cir. 1983), and is reproduced in the separately bound appendix (hereinafter "App.") at pp. 1a - 12a. The decision of the National Labor Relations Board (hereinafter 'NLRB" or "the Board") is reported at 261 NLRB 1343 (1982) and is reproduced at App. 13a - 60a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 9, 1983. App. 1a. On February 17, 1984, Justice O'Connor entered an order extending the time in which to file a petition for a writ of certiorari to and including April 7, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On July 26, 1978,[1] the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter "the Union") filed a petition with the 26th Region of the Board for a representation election among employees at the Employer's Mena, Arkansas plant. The election was conducted on October 6, in which the Union failed to receive a majority of the valid ballots cast.[2] Thereafter, the Union filed both an unfair labor practice charge and objections to the election. The substantive allegations in both the charge and the objections were identical, and both matters were consolidated by the Board's Regional Director for a hearing before the Board's Administrative Law Judge (hereinafter "ALJ"). App. 25a - 26a.

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[1]All dates hereinafter are 1978 unless otherwise indicated.

[2]There were 200 votes for the Union, 213 for the Company, and nine challenged ballots. Said challenges were insufficient in number to affect the results of the election. App. 25a.

In his decision of January 22, 1981, the ALJ found that the Union and the Board's General Counsel failed to establish that the Employer had committed certain acts alleged to be both unfair labor practices and objectionable conduct. However, the ALJ also found that the Employer had coercively interrogated and threatened employees in other respects, and had verbally promulgated an overly broad no-solicitation rule. The ALJ concluded that these acts of the Employer violated §8(a)(1) of the National Labor Relations Act (hereinafter "the Act"), as amended, 29 U.S.C. §158(a)(1), and also interfered with the election. The ALJ ordered the Company to cease and desist from the unfair labor practices found, and he set aside the results of the October 6 election and ordered that the Regional Director conduct a second election. App. 56a.

Subsequent to the ALJ's decision, the Company filed exceptions with the Board. In its May 28, 1982, Decision, Order, and Direction of Second Election,[3] the Board reversed certain of the ALJ's findings that the Employer had violated §8(a)(1) and committed objectionable conduct. However, the Board affirmed the ALJ's decision with respect to his other findings, set aside the results of the election, directed a second election, and ordered the Company to post a Notice to Employees regarding said unfair labor practices. App. 18a - 21a.

Thereafter, the Company filed a Petition for Review with the United States Court of Appeals for the Sixth Circuit. In addition to its contentions that the Board's findings below were not supported by substantial evidence, the Company argued that, under controlling Sixth Circuit precedent,[4] the court also had jurisdiction to review the Board's order directing a second election. The court, however, rejected the Employer's contentions, enforced the Board's §8(a)(1) findings, and concluded

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[3]261 NLRB 1343 (1982). App. 13a - 23a. The Board's panel consisted of Members Fanning, Jenkins, and Zimmerman. App. 21a.

[4]*Maremont Corp. v. NLRB*, 666 F.2d 1037 (6th Cir. 1981).

that "the direction of an election by the Board is not a 'final order' within the meaning of Section 10(f), 29 U.S.C. §160(f), and not subject to review." App. 9a. The court held further that the Board's order directing a second election "can only be challenged in the context of the Company's later refusal to bargain because of the asserted error in the Board's order." App. 9a.

REASONS FOR GRANTING THE WRIT

A. *The Court Of Appeals Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court*

Shortly after passage of the Act, this Court spoke on the issue of the jurisdiction of the Courts of Appeals to review orders of the Board directing *initial* elections. Thus, in *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940), the Court held that §10(f) of the Act, 29 U.S.C. §160(f)[5] only provided for appellate review of a "final order" of the Board. In holding that the Board's direction of an initial election was not a "final order"[6] the Court relied, *inter alia*, upon the legislative history of the Wagner Act. Thus, the Court found:

> [The Act] provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of an election. 79 Cong. Rec. 7658. *Id.* at 411.

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[5] 29 U.S.C. §160(f) provides in relevant part:

> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in. . . . The Court . . . shall have the same jurisdiction . . . to make and enter a decree . . . setting aside in whole or in part the order of the Board. . . .

[6] *See also NLRB v. International Bhd. of Elec. Workers*, 308 U.S. 413 (1940); *NLRB v. Falk Corp.*, 308 U.S. 453 (1940).

However, while it is clear that this Court generally has circumscribed the jurisdiction of the Courts of Appeals to review orders of the Board in cases involving directed *first* elections,[7] it is likewise clear that neither the Court nor Congress had in mind the type of situation presented in the instant matter, wherein: (1) a first election *already* was held; (2) *identical* charges and objections were filed; (3) the Board found merit to certain of the charges and objections and, *as part of its remedial order*, directed a *second* election; and (4) review was sought in the Courts of Appeals from the Board's order in the consolidated cases.

Petitioner submits that the Sixth Circuit Court of Appeals' holding that it lacked jurisdiction to review the Board's remedial order directing a *second* election in this case misconstrues and misapplies the teachings of this Court set forth in the above-cited cases. There is a distinct and fundamental difference between cases in which the Board has exercised the authority granted it by Congress to direct an *initial* election among employees in an appropriate unit; and one wherein (as here) an election *already* was conducted, unfair labor practice and objection allegations were consolidated for trial, and based upon identical unfair labor practice and objection facts, the Board ordered a second election. In the former situation there are substantial practical and statutory reasons for the judiciary *not* to interfere with the

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[7]This Court has recognized exceptions to the policy of non-reviewability of Board orders directing *initial* elections in two circumstances. First, where expeditious, direct review is warranted due to "the presence of public questions particularly high in the scale of our national interest because of their international complexion." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963). Second, direct review is available where the Board has acted "in excess of its delegated powers and contrary to a specific prohibition in the Act." *Leedom v. Kyne*, 358 U.S. 184, 188 (1957).

Petitioner does not contend that either of these recognized exceptions are applicable to the case at bar. Indeed, such exceptions are irrelevant because, as with the other cases heretofore decided by this Court, they concerned Board orders involving first elections, and not orders directing *second* elections as part of the Board's remedy.

Board's order. In the latter, however, practical and statutory considerations (discussed *infra*) compel the conclusion that the Courts of Appeals can, and *should*, intervene.

In short, the Sixth Circuit's (as well as other Courts of Appeals')[8] mechanical reliance on this Court's precedent in *American Federation of Labor, supra; Electrical Workers, supra; and Falk, supra,* is erroneous. The issue of whether the Courts of Appeals have jurisdiction to review the Board's remedial orders directing second elections in the circumstances presented herein is a recurring one. Additionally, this matter is one of unusual practical importance inasmuch as the rulings of the various Courts of Appeals on this issue merely serve to prolong Board representational proceedings, frustrate the purposes of the Act, and result in a waste of judicial resources. Furthermore, as discussed below, an increasing number of Courts of Appeals judges recently have begun to recognize the fallacy of the approach heretofore taken, and have voiced both legal and practical arguments in support of their positions *identical* to those advanced by Petitioner herein.

B. *Prior Decisions Of This Court Support The Result Urged By Petitioner*

As stated, this Court's prior decisions on the scope of appellate review of Board election decisions do not address the instant situation—a directed second election as part of the Board's remedy in a combined unfair labor practice/objections case. Nevertheless, this Court's precedent indicates that the Sixth Circuit's decision was erroneous.

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[8] *See, e.g., TRW-United Greenfield Div. v. NLRB,* 637 F.2d 410, 415 n. 5 (5th Cir. 1981); *NLRB v. Intertherm, Inc.,* 596 F.2d 267, 278 (8th Cir. 1979); *NLRB v. Monroe Tube Co.,* 545 F.2d 1320, 1329 (2d Cir. 1976); *NLRB v. Auto Crane Co.,* 536 F.2d 310, 311 (10th Cir. 1976); *NLRB v. Styletek, Div. of Pandel-Bradford, Inc.,* 520 F.2d 275, 277 n. 2 (1st Cir. 1975); *Daniel Const. Co. v. NLRB,* 341 F.2d 805, 809-10 (4th Cir.), *cert. denied,* 382 U.S. 831 (1965).

Thus, in *American Federation of Labor v. NLRB, supra,* the issue was whether the Board's certification of a union as bargaining representative was directly reviewable by a Court of Appeals in the absence of any unfair labor practice proceeding that would vest it with jurisdiction under §10(f) of the Act. As stated above, the Court answered that question in the negative. However, in analyzing the legislative history of the provisions of the Act that provide for appellate review, the Court observed that "the committee reports were emphatic in their declaration that the provisions of the bill for court review did not extend to proceedings under §9 *except as incidental to review of an order restraining an unfair labor practice* under §10." 308 U.S. at 410 (emphasis supplied). In the instant case, there can be no question that the Board's order directing a second election was but "incidental" to its decision concerning unfair labor practices. Indeed, the *sole* basis for the Board's order were its unfair labor practice findings.

Moreover, in *NLRB v. Falk Corp., supra,* the Court held that:

> There can be no court review under §9(d) until the Board issues an order and requires the employer *to do something predicated upon the result of the election.* 308 U.S. at 459 (emphasis supplied).

Here, the Board *has* issued an order, part of which was the direction of a second election. Thus, the Company *was* ordered to "do something," i.e., to submit to a directed second election. Further, such clearly was "predicated upon the result of the [first] election."

Similarly, in *Boire v. Greyhound,* 376 U.S. 473 (1964), the Court held that the U.S. District Courts lacked power to enjoin the Board's direction of a first election. In that case, the Court reaffirmed its ruling in *American Federation of Labor, supra,* that Board orders in certification proceedings, standing alone, normally are not directly reviewable. The Court observed, however, that such decisions are "normally reviewable only where the dispute concerning the correctness of the certification

eventuates in a finding by the Board that an unfair labor practice has been committed. . . ." 376 U.S. at 477.[9] Clearly, in the case at bar the Board's order of a second election is inextricably interwoven with its unfair labor practice findings. Hence, this case falls within the scope of review of the Courts of Appeals, as contemplated by this Court in *Boire v. Greyhound, supra*.

C. *There Is Currently Great Debate, Dissention, And Confusion Among The Courts Of Appeals On The Issue Presented Herein*

Until very recently, the Ninth Circuit Court of Appeals had held that the courts possessed jurisdiction to review Board orders directing a second election when, as in the case at bar, those orders were based entirely on unfair labor practice findings that also were on review. *Raley's, Inc. v. NLRB*, 703 F.2d 410, 415-16 (9th Cir. 1983).[10] Later, the Ninth Circuit granted *en banc* review to the decision of its panel in *Raley's, Inc.* and, in an opinion decided on February 13, 1984, reversed the panel's decision in that case. *Raley's Inc. v. NLRB*, 725 F.2d 1204 (9th Cir. 1984).

However, it is important to note that in its *en banc* opinion the court *acknowledged* that there was "practical sense" in the panel's holding "that when an order requiring a new election is based upon the alleged unfair labor practice under review, judicial economy would perhaps be better served by a concurrent review of the election order." 725 F.2d at 1206. Yet, the court felt

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[9]In *Boire v. Greyhound*, the Court added, *by way of example only*, that one such unfair labor practice could be where "an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate unit." 376 U.S. at 477. It is significant that (as with other Circuits) the Sixth Circuit Court of Appeals in the instant case ruled that the *only* time a Board election order can be reviewed is when such ultimately results in an employer's refusal to bargain unfair labor practice. *Boire* does not support this limited interpretation.

[10]*See also, Anja Engineering Corp. v. NLRB*, 685 F.2d 292, 297 (9th Cir. 1982); *Summa Corp. v. NLRB*, 625 F.2d 293, 296 (9th Cir. 1980); *NLRB v. General Tel. Directory Co.*, 602 F.2d 912, 920 (9th Cir. 1979).

constrained by this Court's decision in *Boire v. Greyhound, supra,* and ruled that it lacked jurisdiction to review the Board's order directing a second election. *Id.* Significantly, nowhere in the Ninth Circuit's *en banc* opinion in *Raley's, Inc.* did the court come to grips with the fact that (as discussed above) in *Boire v. Greyhound, supra; American Federation of Labor v. NLRB, supra,* and other similar cases decided by this Court, the question at issue was only that of the Courts of Appeals' jurisdiction to review an *initial* order of the Board directing an election. This Court has *never* decided the precise issue presented herein, and Petitioner submits that it should do so now and agree with the Ninth Circuit that "practical sense" compels the result reached previously by that court.

An additional example of the confusion extant among the Circuits concerning their jurisdictional authority to review Board remedial orders directing second elections is presented by the Sixth Circuit, from which a writ of certiorari is sought in the instant petition. Thus, in *Maremont Corp. v. NLRB,* 666 F.2d 1037 (6th Cir. 1981), the court was presented with a case identical to this one, i.e., the Board had consolidated unfair labor practice charges and election objection allegations (which were based upon identical facts), and had issued a Decision and Order regarding the unfair labor practices combined with a Direction of Second Election. It is clear that the *Maremont* court concluded that it had jurisdiction to review *the Board's order directing a second election* along with its unfair labor practice order inasmuch as it held:

> We are of the opinion that the order of the Board setting aside the election is not supported by sufficient evidence and is clearly erroneous. It is therefore ordered that said order of the Board be set aside and held for naught and that said election conducted be held to be valid. *Id.* at 1037.[11]

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[11]In the decision which gave rise to the instant petition, the Sixth Circuit recognized that its ruling was contrary to that in *Maremont.* However, the court did not overrule its previous decision. Rather, it merely opined that *Maremont*

(footnote continued on next page)

Finally, Petitioner submits that the most scholarly and cogent discussion of this issue (and the error heretofore committed by the Courts of Appeals) appears in *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534 (3d Cir. 1983). There, the court's majority conceded that "considerations of efficiency and judicial economy seem to suggest that we review the election order" as well as the Board's unfair labor practice findings. However, the majority declined to review the Board's election order in conjunction with its unfair labor practice decision "issued in a consolidated proceeding and involving common facts." *Id.* at 543.

Circuit Judge Garth dissented because "neither the National Labor Relations Act, nor the authorities interpreting that Act, establish that a Court of Appeals has no jurisdiction in a situation such as this one." *Id.* at 544. As found by Judge Garth, the provisions of the Act:

> do not, by their terms, expressly grant or withhold Court of Appeals jurisdiction over a Board order for a *second* election. Indeed, [the provisions of the Act] do not even address this subject, any more than they expressly address Court of Appeals jurisdiction to review an order which directs, or results from, an initial representation election. *Id.*

After discussing the established rule of law that Board orders directing *initial* elections are not reviewable by the Courts of Appeals, Judge Garth observed:

> Yet, it is undeniable that the Act on its face does not expressly limit section 160(f) ("final order") review of election orders to situations where an order based on Section 158(a)(5) (refusal to bargain) has issued. *Id.* at 545.

In concluding that a §8(a)(5) refusal to bargain situation is not the only manner in which review of the Board's order directing a

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[11](continued)
"did not recite any legal authority or espouse any reasoning in support of its decision." App. 11a.

second election can come before the courts, Judge Garth stated:

> I suggest that this cannot be so for three reasons. First, that portion of the Board's order directing a new election constitutes no more than an incidental and remedial aspect of the Board's cease and desist order predicated on unfair labor practices, which we have not sustained. . . .
>
> Second, neither the statute nor the cases glossing the statute, require that another and needless second election must now be held in order to vest this court with jurisdiction to set aside an "election order" which should never have been issued in the first place.
>
> Third, not only do I regard the "new election" order as part and parcel of the Board's "final" cease and desist order, so that both are reviewable by us as a "final order," but I also regard reviewability at this time to be required by sheer logic, reason and common sense. *Id.* at 546.

In sum, Judge Garth found that:

> treating or regarding the Board's order for a new election as a separate and discrete order which must carry the weight of finality of and by itself in this context, exalts form over substance. *Id.* at 547.

Subsequent to the decision of the panel in *Graham Architectural Products, supra,* the petitioner sought a rehearing and hearing *en banc.* Although a majority of the Third Circuit denied the petitioner's hearing *en banc* request, it is significant that Circuit Judge Adams, joined by Circuit Judges Hunter and Weis, issued a statement supportive of Judge Garth's earlier dissent in that case. In *Graham Architectural Products Corp. v. NLRB,* 706 F.2d 441 (3d Cir. 1983), Judge Adams noted that the court's panel had refused enforcement to four of the Board's six unfair labor practice findings. He observed that:

> Therefore, that election should not have been set aside. And this Court, on review of the second election, will almost

assuredly overturn the second election as improperly authorized inasmuch as the first election was valid. *Id.* at 442.

Judge Adams found further:

> The appeal here is not taken under an exception to the final order doctrine, but rather under the final order doctrine itself. The Board has issued a final order resolving these unfair labor practice charges, and the fact that a portion of the remedy imposed in that single order is a re-run election does not change the plain language of the statute which gives a court of appeals authority to deny enforcement "in whole" to the order if the court believes it necessary to do so. *Id.* at 443.

Judge Adams concluded that:

> Cases such as *Boire v. Greyhound,* 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964) and *American Federation of Labor v. National Labor Relations Board,* 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347 (1940), were decided with concern for the delay which pre-election appeals would cause; they did not address the question whether a court having proper jurisdiction over the issues underlying a re-election order should refuse to decide the question whether the second election should be held. . . . Having once placed a judicial gloss on a statute, we must always be careful to examine the reasons underlying the first decision in order to make certain that we are justified before we apply the second layer of varnish to that legislative act. When the reason for a particular interpretation has ended, so must the interpretation. By relying on prior decisions that may be based on policy concerns not present in the case now before the court, the majority appears to be elevating form over substance, and relying on a rule even though the rationale for that rule does not apply in the present situation. Justice Cardozo eloquently reminded us many years ago that when concepts are "developed with merciless disregard of consequences to

the limit of their logic," they become "tyrants rather than servants" of those who employ them. *The Paradoxes of Legal Science*, p. 61. *Id.* at 443-44.

Accordingly, four judges of the Third Circuit Court of Appeals are fully supportive of Petitioner's position herein, i.e., there is nothing in the Act or prior decisions of this Court which prevents the Courts of Appeals from asserting jurisdiction over Board remedial orders directing *second* elections, as opposed to orders of the Board directing an *initial* election. In the case of an initial election, there are substantial reasons for the Courts of Appeals *not* to assert jurisdiction. Otherwise, substantial delays in the representation process would ensue, which could be injurious to employees' rights to self-organization. In the case of a *second* election, however, which (as here) is directed by the Board as part of its remedial order in conjunction with its unfair labor practice findings, such considerations do not exist.

Thus, using the instant case as an example, the first election was held on October 6, 1978, five and one-half years ago. *Had* the Sixth Circuit Court of Appeals asserted jurisdiction over the Board's Direction of Second Election, it might have concluded that, although the Board's unfair labor practice findings were supported by substantial evidence, such were not serious enough to taint the results of the first election. By its refusal to review the Board's remedial second election order, the court has condemned the Company and its employees to undergo another, possibly meaningless, election; the results of which ultimately may be overturned by the Court of Appeals after *additional* years of delay and litigation expense.

Such a result only serves to *increase* delays in the Board's representational process, and causes the Courts of Appeals needlessly to expend their resources in evaluating *twice* what could have been resolved in a *single* proceeding.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the matter should be remanded to the Court of Appeals for the Sixth Circuit with instructions to evaluate whether substantial evidence on the record as a whole supports the Board's direction of second election.

Respectfully submitted,

ARNOLD E. PERL
RICHARD M. KOBDISH*

YOUNG & PERL, P.C.
One Commerce Square
Suite 2380
Memphis, Tennessee 38103
(901) 525-2761

Attorneys For Petitioner,
U.S. Electrical Motors,
A Division of Emerson Electric Co.

**Counsel of record*

CERTIFICATE OF SERVICE

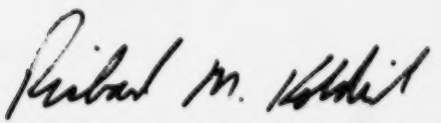
I, Richard M. Kobdish, do hereby certify that on April 6, 1984, three (3) true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, as well as three (3) true and correct copies of the accompanying Appendix, were deposited in the United States Post Office with first class postage prepaid and properly addressed to the following parties to this action and others required to be served:

WILLIAM L. LUBBERS
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

I also certify that all parties required to be served have been served, and that forty (40) copies of said Petition, and forty (40) copies of said Appendix, were served on the same day and in the same manner on:

ALEXANDER L. STEVAS, Clerk
Office of the Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543



RICHARD M. KOBDISH

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ARNOLD E. PERL
RICHARD M. KOBDISH*
YOUNG & PERL, P.C.
Suite 2380
One Commerce Square
Memphis, Tennessee 38103
(901) 525-2761

Attorneys For Petitioner,
U.S. Electrical Motors,
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**Counsel of record*

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 82-1422/1568

U.S. ELECTRICAL MOTORS,
A DIVISION OF EMERSON ELECTRIC CO.
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD.

Decided and Filed December 9, 1983

Before: KEITH and WELLFORD, Circuit Judges, and WEICK, Senior Circuit Judge.

PER CURIAM. U.S. Electrical Motors (the Company) petitions for review of an order of the National Labor Relations Board (NLRB), which found the Company had committed unfair labor practices during an election campaign conducted by the International Association of Machinists and Aerospace Workers (the Union) at the Company's Mena, Arkansas, plant. The NLRB set aside the results of the election in which the Union was narrowly defeated and ordered a second election. The NLRB cross-petitions for enforcement of that part of its order which requires the Company to cease and desist from prohibited unfair

labor practices and to post a prescribed notice to employees on the premises.[1]

This appeal presents important questions on the review of Board orders in the United States Courts of Appeals. They include the following:

1) Whether the United States Court of Appeals for the Sixth Circuit may review a Board decision concerning events transpiring in Arkansas (Eighth Circuit), where the petition for review is brought by a Company headquartered in Connecticut (Second Circuit), and there is no proof in the record that the Company transacts business within the Sixth Circuit.

2) Whether, assuming this Court has jurisdiction to consider such a petition, venue is properly in another Circuit.

3) Whether the Court has jurisdiction to review the order of the Board setting aside the contested election, and ordering a new election.

4) Whether the Board's finding of unfair labor practices is supported by substantial evidence.

We assume jurisdiction in this case under a broad reading of the National Labor Relations Act (NLRA), 29 USC § 160 (f), with some reservation. We would ordinarily have transferred the case to a more appropriate venue, the Eighth Circuit, were it not for the consent by the Board to our considering the case and the oral representation by counsel for both parties that the Company did business in this Circuit during the applicable period. We hold that we have no jurisdiction to review that part of the Board's order relating to the representation proceeding since an election order is not a "final order" within the meaning of the Act, 29 USC § 160 (f), *et seq.* We AFFIRM the remainder of the Board's order.

I.

This case arose out of a charge filed by the Union on October

[1]The Board contends that its election order is not reviewable.

17, 1978, and amended on November 27, 1978. The Union charge was consolidated with its objection to the October 6, 1978, election at which it was defeated 212-200. The case was heard before an Administrative Law Judge (ALJ), who issued a lengthy decision on January 22, 1981. Exceptions were taken by the Company, and on May 28, 1982, a three-member panel of the NLRB affirmed in large part the ALJ's decision. 261 N.L.R.B. 184 (1982).

All of the alleged unfair labor practices took place during the Union's organization campaign preceding the election in controversy. The ALJ sustained a number of the charges of Company misconduct, but dismissed others. The Board agreed that the Company had infringed upon its employees' rights protected by section 7 of the Act, 29 USC § 157.[2]

The NLRB general counsel and the Union contended in the administrative proceedings that the Company had intentionally interfered with its employees' section 7 rights by threatening disastrous results, including the closing of the Mena plant, if the labor force became organized. The Company replied that it was in the midst of serious financial difficulties which raised the real potential of closing the plant at Mena, not merely that it was a contrivance designed to oppose the Union. The ALJ made the following finding of fact on this issue:

> Whether the operational problems of USEM, and particularly at the Mena plant, were real or, as the General Counsel

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[2]Section 7 provides, in pertinent part, as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 USC § 157.

Under section 8(a) (1) of the Act, 29 USC § 158(a) (1), it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]."

> suggests, concocted as a vehicle of disguise [sic] threats to close the Mena plant, is not critical to the ultimate resolution of the complaint allegations based thereon. I am persuaded by the record evidence that USEM had problems and there was urgency to solve these problems for it to be a profitable division of Emerson. However, unchallenged record evidence also conclusively establishes that the Respondent seized upon these problems to interfere with, restrain and coerce its employees in the exercise of their Section 7 rights in violation of Section 8(a) (1) of the Act.

The ALJ's decision also discussed isolated contacts between supervisors and employees, some of which the ALJ found to have constituted coercive interrogation.

The Board adopted the decision of the ALJ with respect to the above finding.[3] The Board made the following conclusion of law:

> By interrogating its employees concerning their union membership, activities and desires; by threatening its employees directly or by implication, that it would close its Mena plant if the Union were selected as its employees' collective-bargaining representative; by threatening its employees, directly or by implication, that the selection of the Union at its Mena plant would inevitably result in strikes and violence; by threatening its employees that it would be futile for them to select the Union to represent them by telling them that it would not bargain in good faith with the Union; and by threatening its employees that they would be subject to discipline for alleged violations of its no-solicitation rule based solely upon complaints from other employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and Section 2(6) and (7) of the Act.

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[3]The Board did reject two findings, not discussed above, which held that the Company had promulgated an overly broad no-solicitation rule, and that a local newspaper had acted as the Company's agent in publishing an article and editorial unfavorable to the Union.

The Board ordered the Company to cease and desist from the threats and coercion, and ordered it to post a notice stating that it would not threaten or coerce employees for participating in union activities. The Board also set aside the October 6, 1978, election and ordered a new election to be conducted at a time to be set by the Regional Director of the NLRB.

II.

The Company purports to bring its petition for review in this Circuit under section 10(f) of the National Labor Relations Act, which provides, in pertinent part, as follows:

> Any person aggrieved by a final order by the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

29 USC § 160(f).

Although the Company is clearly an "aggrieved person," the only indications in the record that the Company transacts business in this Circuit take the form of bald assertions in its petition for review and in a footnote at the beginning of its brief.[4]

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[4]The statement appearing in petitioner's petition for review reads as follows: "Petitioner is engaged in business within this Judicial Circuit. Accordingly, this Court had jurisdiction over this Petition to Review pursuant to Section 10(f) of the National Labor Relations Act, as amended [29 USC § 169(f)]." (Bracketed information in original.)

A similar statement appears in footnote two of its brief. "This Court has jurisdiction over these proceedings under Section 10(f) of the Act, as the Petitioner, a person aggrieved by an Order of the Board, transacts business within this judicial circuit."

The Board conceded, however, that the Company has properly petitioned this Circuit for review.

Neither a petitioner nor the Board can confer jurisdiction on this Court when the record is devoid of any evidence whatsoever that the petitioner transacts business within this jurdicial circuit. A threshold issue in this case, therefore, is whether in fact this Circuit has the authority to review this case.

The United States Court of Appeals for the First Circuit recently refused to consider a petition filed by a Connecticut corporation and a New Jersey corporation for review of an NLRB cease and desist order relating to unfair labor practices which took place in Connecticut.[5] *S.L. Industries, Inc. v. NLRB,* 673 F.2d 1 (1st Cir. 1982). The court found insufficient petitioner's allegations of a nexus with the First Circuit:

> In its amended jurisdictional statement and in various supporting memoranda and arguments on this issue, the petitioners allege, and we take as true, that over a period of years they have bought from and sold to various individuals and businessess located in Massachusetts, New Hampshire, and Rhode Island — all of which are located in the First Circuit. Further, S.L. maintains that one of these customers, Technical Papers Corp., of Needham, Massachusetts, has also acted as "exclusive sales representative" for S.L. within the states comprising the First Circuit. There is, however, no evidence that Technical Papers Corp. took any action on the petitioners' behalf other than pursuing the normal course of its own business or that it was compensated for its "exclusive representation."
>
> It is undisputed that neither S.L. nor Extruded has at any time owned or leased property or maintained an office or employees within the First Circuit. Neither corporation,

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[5]New Jersey is located in the Third Circuit; Connecticut is in the Second Circuit.

apparently, is registered to do business in any state within the First Circuit. Thus, their sole contacts are the purchases and sales and the "exclusive representation" arrangement with one Massachusetts customer.

673 F.2d at 2

In discussing its authority to hear the case, the First Circuit referred to the issue as one of "venue," although it noted that other courts had labeled the issue "jurisdictional." Dismissing the appeal for improper venue, then, the court held that if the circumstances alleged by the petitioner were sufficient to bring itself within the authority of the circuit "large corporations would be free to roam the entire country in search of venues which might provide them with what, in their opinion, would be a more favorable hearing. Congress would not have expressly provided a *limitation* on venue had it intended this result." 673 F.2d at 3.

We find in the instant case that since the Board has not challenged the statement by the Company that it transacts business within this Circuit, we may accept the assertion as true and find jurisdiction. *See McLean Trucking* v. *NLRB*, 689 F.2d 605, 607 (6th Cir. 1982). We add, however, that a petitioner for review has an obligation to make more than an unverified statement in his pleadings properly to invoke the jurisdiction of this Court.

Although we find we do have *jurisdiction*, we note that *venue* of the case would have been more appropriate in another forum, and had the Board so requested, we would have transferred the case to the Eighth Circuit. In *Farah Mfg. Co. v. NLRB*, 481 F.2d 1143 (8th Cir. 1973), the Eighth Circuit ordered a case transferred to the Fifth Circuit, even though it found that it had jurisdiction to review the case because the company, under a liberal construction of section 160(f), did business within the Circuit. The Eighth Circuit held:

We believe this case properly belongs in the Fifth Circuit. That court has already passed on some controverics [sic]

> between and among the contending parties and is familiar with the background of this case. The disposition of this case may serve as precedent for the disposition of other controversies which remain in or may arise later in the Fifth Circuit. Farah's basis in asking this court to act rests on some business operations conducted within the geographical boundaries of this circuit but these are completely unrelated to the controversies arising between labor and management at manufacturing plants located in El Paso, Texas. Farah's filing of the petition for review in this court, although not improper, represents "forum shopping," a practice to be discouraged.

481 F.2d at 1145.

In the instant case, the Company's counsel conceded at oral argument that he had petitioned for review in this Circuit because of what he perceived as favorable law for his client. We disapprove the idea of forum shopping in conjunction with 29 USC § 160(f) appeals. Thus, while we have not exercised our authority to transfer this case, we note that such a transfer may be made by a court of appeals regardless of whether a party has moved for a change of venue, and regardless of whether a petition for review has been filed in another circuit.[6] *See Liquor Salesmen's Union Local 2* v. *NLRB,* 664 F.2d 1200 (D.C. Cir. 1981); *NLRB* v. *Wilder Mfg. Co.,* 454 F.2d 995 (D.C. Cir. 1971).

III.

Petitioner urges us to review the Board's order requiring a new election to be held. The well-settled law both in this Circuit and others, derived from *American Federation of Labor* v. *NLRB,* 308 U.S. 401 (1940), and its companion case, *NLRB* v. *International Brotherhood of Electrical Workers,* 308 U.S. 413

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[6]We note as well that the headquarters of Emerson Electric Company, U.S. Electrical Motors' parent corporation, is in St. Louis, Missouri, also in the Eighth Circuit.

(1940); *see also Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964), is that the direction of an election by the Board is not a "final order" within the meaning of Section 10(f), 29 USC § 160(f), and not subject to review. *American Bread Co.* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969).

Courts have uniformly held that since an order of the Board directing an election in a representation proceeding is not a "final order," it can only be challenged in the context of the Company's later refusal to bargain because of the asserted error in the Board's order. The Fifth Circuit has articulated the rule as follows:

> The Company also requests that we vacate the Board's order to hold a second election. However, an order directing an election in a representation proceeding is not a final order directly reviewable by this court under sections 10(e) and (f) of the Act. *See Federal-Mogul Corp.* v. *NLRB*, 566 F.2d 1245, 1249 n.2 (5th Cir. 1978). As this court has held in a similar case:
>
> > Little need be said about the Employer's effort to have us review at this stage the order calling for a new election.... Ever since *American Federation of Labor* v. *NLRB*, 1940, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347; [additional citation omitted] it has been clear that Courts of Appeals do not have the power to review representation proceedings. And jurisdiction does not come into being because the representation order arises out of a consolidated hearing as to which the Court of Appeals has jurisdiction to review the order concerning unfair labor practices.
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> *Hendrix Manufacturing Co.* v. *NLRB*, 321 F.2d 100, 106 (5th Cir. 1963).

Custom Recovery v. *NLRB*, 597 F.2d 1041, 1046 (5th Cir. 1979). *See also NLRB* v. *Intertherm, Inc.*, 596 F.2d 267 (8th Cir. 1979).

Professor Gorman in his *Basic Text on Labor Law* writes as follows:

> Board decisions in representation cases, both before and after the holding of the election, are (absent unusual circumstances) not directly reviewable by the court. *AFL* v. *NLRB*, (U.S. 1940). This includes determination of the Board's jurisdiction, the appropriate bargaining unit, the eligibility of voters, the validity of the election and the certification of the results. These can be judicially reviewed only as an incident to the review of a "final order" of the Board in an unfair labor practice proceeding. Thus, an employer wishing to secure judicial review of a Board determination on any or all of the matters will refuse to bargain with the certified union and will seek to have the Board's unfair labor practice order (under Section 8(a)(5)) set aside because of error in the representation proceeding.

R. Gorman, *supra*, at 49.

The "final order" rule seems to be well settled, *see Raley's Inc.* v. *NLRB*, 703 F.2d 410, 416 n.3 (9th Cir. 1983), and parties seem rarely to have challenged it. One Third Circuit judge in a recent dissent approved treating an NLRB order setting aside an election as a final order, reasoning that there is no logic to permitting the Board to require a new election once a court has found insufficient evidence to support the unfair labor practices which are asserted by the Board as the basis of the election. *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d 534, 543 (3d Cir. 1983) (Garth, J., dissenting).

Congress has vested in the Board great discretion in overseeing labor relations, and the courts have the authority to review its actions only in specifically defined instances. If election orders were immediately reviewable, parties could effectively add greater delay to an already lengthy process of administrative hearings and appeals. Accordingly, we agree with the great weight of authority that the Board's order directing a new election is not a final order.

We therefore hold that the final order rule precludes us from reviewing the Board's order of a new election in the instant case. Although this Court permitted a one-time exception to that rule in *Maremont Corp.* v. *NLRB*, 666 F.2d 1037 (6th Cir. 1981),[7] that case did not recite any legal authority or espouse any reasoning in support of its decision.

IV.

We now examine whether the findings by the Board that the Company violated § 8(a) (1) of the Act is supported by substantial evidence. The Company maintains on appeal, as it did before the Board, that Company officials only discussed the financial liability of the Company, as well as other factors, in response to employee inquiries. The evidence in the record, however, reveals that there was substantial evidence to support the Board's findings. We note especially the conduct of the Mena plant manager, Jim Montgomery, who met with employees in groups of 30 when they were summoned to a conference room by him and Industrial Relations Manager Robert Partain. At those sessions, the two managers addressed the employees concerning the Union and the forthcoming election. The circumstances, as accurately described by the ALJ, make clear that any impression by the employees that the plant might close, or that there might be a strike and/or violence if the Union were voted in, was not an unintended inference, but rather a direct implication of the actions of the Company officials:

> Displayed around the room were numerous posters, newspaper clippings and pictures dealing with strikes, violence and plant closures, particularly the closing of a plant in Shelbyville, Tennessee. While the record is not clear, it appeared that at each of these meetings, Montgomery's opening remarks were to the effect that he could be spending

[7]Since the two circuit judges on the panel in *Maremont* have also served on the panel in the instant case, we have deemed it appropriate to reconsider its holding, for the reasons herein indicated.

> his time better trying to solve the plant's problems and keep it open, but that it was necessary for him to talk about the union. He told them if the Union came in, he would have to divide his time between preparing for negotiations and solving their problems to keep the plant open. He and/or Partain alluded to the posters and newspaper clippings and stated that of the 18 Emerson plants that had been closed, 13 were Union. There was a poster outlining the length of strikes by I.A.M. at Emerson plants and Montgomery told them that I.A.M. had to strike for every contract that it had gotten at Emerson's plants. In at least one meeting, in response to an employees [sic] question as to whether the plant would close if the Union came in, Montgomery said the "question in Mena was not union or no union but plant or no plant."

(Footnotes omitted.)

Also found to have been a violation of § 8(a)(1) of the Act was the address by the President of U.S. Electrical Motors, Russ Hale, to all employees on October 4, 1978. Witnesses testified that Hale said that "it was a bad time for the I.A.M. to try to organize the Mena plant; that he had enjoyed coming to Mena and meeting the people, but if he had to make the decision to close the plant, he would make it." The ALJ and the Board therefore had evidence to support a conclusion that these meetings were threatening and coercive in nature. Although other isolated incidents mentioned were of less significance, we are satisfied that both the ALJ and the Board have examined the record closely and have made findings consistent with the evidence, to which this Court should defer, even if it may not have reached the same conclusions on that same evidence.

Accordingly, the Board's petition for enforcement of its order is hereby GRANTED, the Company's petition is hereby DENIED, and the appeal of that part of the order setting aside the election and ordering a new election is hereby DISMISSED for lack of jurisdiction.

261 NLRB No. 184

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 26 - CA - 7458
and
26 - RC - 5823

U.S. ELECTRICAL MOTORS, A
DIVISION OF EMERSON ELECTRIC CO.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL - CIO

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On January 22, 1981, Administrative Law Judge Robert C. Batson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to

affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, as modified herein.

Respondent has excepted, inter alia, to the Administrative Law Judge's finding that Supervisor Philip Crosby orally promulgated an overly broad no-solicitation rule and to his finding that Derwood Brett, publisher-editor of the Mena Evening Star, was acting as an agent of Respondent in publishing on October 4, 1978,[3] an article and an editorial regarding the union activity at Respondent's Mena facility. For the reasons stated below we find merit in Respondent's exceptions to these findings.

Regarding the alleged promulgation of an overly broad no-solicitation rule, the credited testimony establishes that in the first part of June Supervisor Crosby told employee John Williams that he "realized that [Williams] was involved in the Union, and [Crosby] hoped that it wouldn't interfere with his inspection [duties], and he would't be doing anything on Company time, involving in that." Although the Administrative Law Judge found that at all times relevant herein Respondent had in effect a valid written no-solicitation rule (and no

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[1]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2]The Administrative Law Judge inadvertently failed to include in his Conclusions of Law a provision paralleling his finding that Respondent violated Sec. 8(a) (1) of the Act by Supervisor Danny Titsworth's threat to employee Paul Herrman that he would be disciplined if any additional employee complaints were received regarding Herrman's union solicitations. Inasmuch as we agree that such threat unlawfully conditions Herrman's protected activity on the receptiveness of his fellow employees, we will amend the Administrative Law Judge's Conclusions of Law accordingly.

[3]All further dates herein refer to 1978 unless otherwise specified.

exceptions have been taken to this finding), he also found, based upon the foregoing evidence, that Crosby had orally unlawfully broadened such rule. We do not agree. The record herein shows that later in the month of June, immediately following a second Crosby-Williams incident regarding solicitation while working, Williams was called into the office of Joe Monico, Crosby's immediate superior, and Monico explained Respondent's no-solicitation rule as follows: "that [he was] not allowed to solicit on Company time, but his break periods were his own time to do as he pleased." Thus, although both Crosby and Monico used the ambiguous term "Company time" in relating Respondent's no-solicitation rule, the fact that the rule as posted was valid in conjunction with the fact that any ambiguity in the oral rule was clarified by Monico within a relatively short period of time indicates that Williams could not reasonably have concluded that the rule prohibited solicitation during breaktime or other periods when employees were not actually at work. Accordingly, we conclude that the General Counsel has failed to establish that Respondent promulgated an overly broad no-solicitation rule, and, therefore, we will dismiss this aspect of the complaint and amend the Administrative Law Judge's Conclusions of Law and recommended Order accordingly.

Regarding the alleged agency status of Brett in publishing the October 4 article and editorial, the credited testimony establishes that Jim Montgomery, the Mena plant manager, attended a Lions Club luncheon in September and was asked to speak about the rumors that the plant might close. After asking not to be quoted, Montgomery summarized the economic problems which Respondent faced. Montgomery was asked if the union activity at the plant had any bearing on its closing and Montgomery responded that "those were two separate problems" but that in his opinion the Union was not needed since the campaign was causing dissension and diverting everyone's attention away from solving their operational problems. Immediately after this meeting Brett approached Montgomery and requested permission to publish an article based upon his remarks; Montgomery

denied permission until he could check with Respondent's attorneys. Early during the week of the election herein, Montgomery contacted Brett and gave him permission to publish an article based upon his Lions Club remarks. The publication of this article and the editorial coincided with the meetings held with the employees by Montgomery and Russ Hale, president of Respondent, wherein the unlawful theme of strike violence and the inevitability of the plant closing because of the Union was developed.

Based upon the foregoing evidence and the fact that the theme of the October 4 article and editorial paralleled the theme of the remarks made to employees by Montgomery and Hale, the Administrative Law Judge found that Brett was acting as an agent of Respondent in publishing the article and editorial. We do not agree. Pivotal to the existence of any principal-agent relationship is that the agent be authorized to act on behalf of the principal.[4] In the instant matter, there is no showing that Brett was authorized to publish the October 4 article and editorial on behalf of Respondent. Brett is the editor and publisher of a daily newspaper whose business is to investigate and report on newsworthy issues. Clearly, the undisputed economic problems facing Respondent which Montgomery related "off the record" in his Lions Club remarks constitute such an issue. Thus, when Brett sought permission to publish an article based upon this "off the record" information, he was acting in his own interest and merely was following a procedure standard in the newspaper industry regarding information received "off the record." Furthermore, it is clear that Montgomery's Lions Club remarks contain none of the allegedly unlawful statements of the October 4 article and editorial and there is no showing that Respondent was aware of such statements prior to their publication. Thus, when Montgomery granted Brett permission to publish an article based upon his Lions Club remarks, he merely was removing the self-imposed condition that his remarks regarding Respondent's

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[4]Restatement (Second) of Agency § 1 (1957).

economic problems not be quoted. Finally, the record herein shows that on October 5, the day before the election herein, Brett published the Union's rebuttal on the front page of the newspaper. Although we by no means condone the statements made by Brett in the October 4 article and editorial, in view of the foregoing evidence, we find that the General Counsel has failed to establish that Brett was acting as an agent of Respondent in publishing the same[5] and, therefore, we will dismiss this aspect of the complaint.

Finally, regarding the Administrative Law Judge's recommended Order, we note that paragraphs 1(g) and 2(c) thereof address matters which should be set forth separately from the provisions remedying Respondent's unfair labor practices. Additionally, the Administrative Law Judge inadvertently failed to provide injunctive relief paralleling his finding that Respondent unlawfully threatened its employees that they would be subject to discipline for alleged violations of its no-solicitation rule based solely upon complaints from other employees. Lastly, we note that, in some respects, the notice to employees fails to track the provisions of the recommended Order. Accordingly, we will amend the Administrative Law Judge's recommended Order in these respects.

Amended Conclusions of Law

Substitute the following Conclusion of Law for the Administrative Law Judge's Conclusion of Law 2:

"2. By interrogating its employees concerning their union membership, activities, and desires; by threatening its employees, directly or by implication, that it would close its Mena plant if the Union were selected as its employees' collective-bargaining

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[5]Moreover, in view of the Union's October 5 rebuttal and the record as a whole, we find that the October 4 article and editorial did not create a general atmosphere of fear and coercion so as to render the conduct of a free election impossible. See National Electric Coil Div. McGraw-Edison Company, 184 NLRB 691 (1970).

representative; by threatening its employees, directly or by implication, that the selection of the Union at its Mena plant would inevitably result in strikes and violence; by threatening its employees that it would be futile for them to select the Union to represent them by telling them that it would not bargain in good faith with the Union; and by threatening its employees that they would be subject to discipline for alleged violations of its no-solicitation rule based solely upon complaints from other employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and Section 2(6) and (7) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, U.S. Electrical Motors, a Division of Emerson Electric Co., Mena, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their membership in, activities on behalf of, or desires regarding the International Association of Machinists & Aerospace Workers, AFL - CIO (IAM), or any other labor organization.

(b) Threatening its employees, directly or by implication, that it would close its Mena plant if the IAM, or any other labor organization, were selected as its employees' collective-bargaining representative.

(c) Threatening its employees, directly or by implication, that the selection of the IAM, or any other labor organization, at its Mena plant would inevitably result in strikes and violence.

(d) Threatening its employees that it would be futile for them to select the IAM, or any other labor organization, to represent them by telling them that it would not bargain in good faith with said labor organization.

(e) Threatening its employees that they will be subject to discipline for alleged violations of its no-solicitation rule based solely upon complaints from other employees.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its Mena, Arkansas, plant copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the compliant, insofar as it alleges violations not found in the Administrative Law Judge's Decision, as modified herein, be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the election conducted on October 6, 1978, in Case 26 - RC - 5823 be, and it hereby is, set aside and said case is hereby remanded to the Regional Director

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[6]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

for Region 26 for the purpose of conducting a second election at such time as he deems appropriate.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 26 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[7] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Association of Machinists & Aerospace Workers, AFL - CIO.

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[7]In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the

Dated, Washington, D.C. May 28, 1982

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

DON A. ZIMMERMAN, Member
NATIONAL LABOR RELATIONS BOARD

Regional Director for Region 26 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed..

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT coercively interrogate our employees concerning their membership in, activities on behalf of, or desires regarding the International Association of Machinists & Aerospace Workers, AFL - CIO (IAM), or any other union.

WE WILL NOT threaten our employees, directly or by implication, that we would close our Mena plant if the IAM, or any other union, were selected as our employees' collective-bargaining representative.

WE WILL NOT threaten our employees, directly or by implication, that the selection of the IAM, or any other union, at our Mena plant would inevitably result in strikes and violence.

WE WILL NOT threaten our employees that it would be futile for them to select the IAM, or any other union, to represent them by telling them that we would not bargain in good faith with said Union.

WE WILL NOT threaten our employees that they will be subject to discipline for alleged violations or our no-solicitation rule based solely upon complaints from other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

U.S. ELECTRICAL MOTORS, A
DIVISION OF EMERSON ELECTRIC CO.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower, 8th Floor, 1407 Union Avenue, P. O. Box 41559, Memphis, Tennessee 38104, Telephone 901-521-2725.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

Cases 26-CA-7458
26-RC-5823

U.S. ELECTRICAL MOTORS,
A DIVISION OF EMERSON ELECTRIC CO.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL - CIO

COLEMAN W. GARRETT, ESQ.,
of Memphis, TN,
Counsel for the General Counsel.

J. RONALD PETRIKIN
and
WILLIAM L. SOSSAMAN, ESQS.,
(Young and Perl, P.C.) of Memphis, TN,
for the Respondent-Employer.

ED HOUSE,
appearing on behalf of
J. D. CROWE, of Dallas, TX,
for the Charging Party-Petitioner.

DECISION

Statement of the Case

ROBERT C. BATSON, Administrative Law Judge: This consolidated proceeding under the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq. (herein the Act), was tried before me at Mena, Arkansas, based upon an Order Consolidating Cases, Compliant and Notice of Hearing, issued by the Regional Director for Region 26, on February 22, 1979, arising out of a charge filed by International Association of Machinists & Aerospace Workers, AFL-CIO, herein the Union, on October 17, 1978,[1] and amended on November 17, and Objections to the Election in Case 26-RC-5823, filed by the union on October 11, alleging that U.S. Electrical Motors, A Division of Emerson Electric Co., herein the Respondent or Employer, had violated Section 8(a) (1) of the Act and committed certain conduct which warranted setting aside the election conducted on October 7 and the direction of a new election.

The complaint alleges that Respondent violated Section 8(a) (1) of the Act in numerous particulars by the conduct of its supervisors between June 8 and October 4. The Petition for Certification of Representative in Case 26-RC-5823 was filed by the Union on July 16. A Stipulation for Certification Upon Consent Election in an appropriate unit[2] was approved by the Regional Director for Region 26, on August 21, pursuant to which a secret ballot election was conducted among the employees in the unit on October 6, which resulted in a tally of ballots reflecting that of 441 eligible voters, 200 cast valid ballots for, and 213 cast valid ballots against, the Union. Nine ballots were challenged. As a result of the investigation of the Union's timely filed objections on November 21, the Regional Director issued his Report on Objections, recommending that objections

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[1]All months and dates hereafter are 1978 unless otherwise indicated.

[2]The unit is not identified in the record.

numbered 1, 9 and 14 be overruled and the remainder of 2 through 16, he consolidated with the complaint herein for hearing. On January 12, 1979, the Board adopted these recommendations.

All parties were represented at the hearing by counsel or other representatives and were afforded full opportunity to participate by presenting evidence and testimony; to examine and cross-examine witnesses; to make oral argument and to file post-hearing briefs. A brief has been received from Counsel for the Respondent. The Counsel for the General Counsel did not file a brief, but made oral record argument.

Upon the entire record in this case,[3] including my observations of the testimonial demeanor of the witnesses testifying under oath, and upon substantial reliable evidence, I make the following:

Findings of Fact

I. The Business of Respondent

The Respondent is, and at all times material herein has been, a corporation doing business in the state of Arkansas, with an office and place of business located at Mena, Arkansas where it is engaged in the manufacture and sale of electrical motors. During

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[3]The official transcript of these proceedings is replete with errors, most of which are typographical and include misspellings and "phonetic" spelling. The Respondent filed a Motion to correct the transcript with respect to most such errors. The Motion is hereby granted and the transcript is corrected as requested therein. The Motion is hereby made a part of the official record. In addition thereto; wherever "Hearing Officer' appears, it is corrected to read "Administrative Law Judge". The pagination of Volume II of the official transcript is also incorrect. The pages are numbered 1 through 199. The correct pagination would be 131 consecutively through 329. Volume III of the transcript is numbered 405 through 651. For the convenience of reviewing tribunals, it is hereby ordered that the pagination of Volume II be physically corrected to reflect pages 131 through 329. Pages 330 through 404 are hereby bridged and do not appear in the record.

the 12 month period preceeding the issuance of the compliant herein, Respondent sold and shipped from its Mena, Arkansas, plant products valued in excess of $50,000 directly to points located outside the state of Arkansas.

The complaint alleges, the Respondent admits, and I find, that at all times material herein, the Respondent was an employer as defined in Section 2(2) of the Act, and engaged in commerce and in activities affecting commerce as defined in Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the Respondent admits, and I find, the Union herein is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Disposition of Some Objections

The Petitioner's Objections numbered 2, 3, 4 and 5 on their face alleges [sic] conduct occurring prior to the filing of the Petition in Case 26-RC-5823, and are therefore outside the critical period and may not be considered as objectionable conduct for the purpose of setting aside the election. Goodyear Tire & Rubber Co., 138 NLRB 453. No evidence was submitted in support of Objection 2 and 5. Evidence was presented in support of Objections 3 and 4 which are co-extensive with the complaint allegations. In accordance with well settled Board law, this evidence will be considered in assessing the impact of the Employer's conduct during the critical period. Objections 2, 3, 4 and 5 must be overruled, and they hereby are, dismissed.

No evidence was submitted in support of Objections numbered 6, 8, 16 and the portion of Objection 13 alleging the conduct of a Jack Robock. [sic] The conduct alleged in these objections are not co-extensive with any complaint allegation. Accordingly, Objections numbered 6, 8, 16 and the portion of Objection 13 relating to the conduct of Robock [sic] are hereby overruled and dismissed.

Objections numbered 7, 10, 11 12, 15 and the portion of Objection 13 alleging conduct of the Employer's president Russ Hale are co-extensive with the complaint allegation and are the only objections now before me for consideration.

B. Background

U.S. Electric [sic] Motors (hereafter USEM) consists of five plants and is one of 40 to 50 divisions of Emerson Electric Co. The five plants making up the USEM division are located at Mena, Arkansas, the plant here involved,; [sic] Philadelphia, Mississippi,; [sic] Durant, Oklahoma,; [sic] Los Angeles, California,; [sic] and Prescott, Arizona. The employees of the plant at Prescott have been represented by the International Brotherhood of Electrical Workers for about 14 years and the employees of the plant at Los Angeles has been represented by a Teamsters Local Union for more than ten years. The employees at the other three plants are not represented by a labor organization.

The president of USEM, at times material herein, was Russ Hale, who assumed that job on April 7. Hale is responsible to, and directly supervised by, William Rutledge, Vice-Chairman of the Board of Directors of Emerson Electric Company. The Respondent contends that Hale was recruited for that job because of his proven management capabilities and the fact that USEM was in serious trouble due to declining profits since 1975. Shortly after assuming the presidency of USEM, on April 11 and 12, a divisional planning conference was held at Milford Connecticut, USEM's headquarters, wherein it was determined that overcapacity, which was defined as "maintaining more plant space and production capacity than was being used," was one of the major factors contributing to USEM's problems. At that conference USEM's vice-president of manufacturing, Maurice Tisdale, presented a proposal that the Los Angeles plant he [sic] closed and its production be divided among the remaining four plants. According to the Respondent, this proposal was rejected because its new president had not been involved in the planning

and that the proposal may have been too hastily drawn without sufficient study and consideration. At this conference it was decided to employ outside experts to study these operational problems and make recommendation [sic] for a solution.

The background set forth above is based upon unchallenged evidence and testimony, primarily the testimony of Russ Hale, presented by the Respondent. Neither the General Counsel nor the Charging Party presented any evidence in conflict with that of the Respondent and apparently do not contend that the operational problems outlined by the Respondent are other than valid. The Respondent contends that it is necessary to consider this background, all of which preceeded the advent of any union activity at Mena, which commenced on May 13, in order to assess whether or not its subsequent conduct, specifically telling the employees the Mena plant might be closed, was unlawful.

According to the Respondent, it took several months to implement the plans made at the Milford conference in April to obtain a competent consultant from outside Emerson management to study the problems of USEM and present a solution. In early August the Respondent hired James D. Sutton, whom it contends by virtue of education and experience was uniquely qualified, [sic] to study and solve the problems of USEM. Russ Hale testified that he advised Sutton that in his opinion the only solution to their problems was to close one of the five plants and he should direct his efforts toward determining which plant to close.

Shortly thereafter, August 27, 28 and 29, Emerson held its corporate planning conference at St. Louis, Missouri, which involved all divisions and subsidiaries of Emerson. According to Hale, the theme of the conference was to "fix the losers," i.e., identify the divisions with problems and devise a program to correct such problems. If this could not be done Emerson "may decide to divest itself of the loser". Hale testified that, much to his surprise, USEM was cited throughout the conference to the other divisions as a bad example, and that he privately received severe personal criticism from Emerson's top management.

Prior to leaving St. Louis, Hale sent telegrams to the plant managers of his five plants scheduling a meeting with them and their staffs for August 31 at Milford, Connecticut. The Mena plant manager, Jim Montgomery, and several of his staff attended this meeting at which Hale relayed to them the data he had been given at St. Louis which reflected that in USEM production costs were up although production was down 4 to 5 percent. On-time deliveries had decreased 9 percent and scrap and costs of rework was up to 18 percent and the inventory of USEM constituted about one-half of its total assets. According to Hale, the Philadelphia plant had shown consistent improvement and the Durant plant was acceptable except in quality. The efficiency of the other three plants was poor with Mena falling the lowest in almost all areas. He advised those in attendance that it appeared that at least one and possibly two of its plants would have to be closed and with the exception of the Philadelphia plant the ax could fall on any of the remaining four plants. Hale testified that there was no mention of the union activity at Mena, or the unions representing the employees at Prescott and Los Angeles. Hale, as did Montgomery, testified that Hale instructed the plant managers to advise all personnel in their plants of these problems and seek their assistance in helping to solve them.

The unfair labor practices attributed to Hale, Montgomery and Derwood Brett, editor-publisher of the Mena Evening Star, herein alleged to be an agent of Respondent, as set forth in paragraph 8 of the complaint and the conduct of Montgomery as set forth in paragraph 9(a) of the complaint arises directly out of this background.

C. Respondent's Campaign

Whether the operational problems at USEM, and particularly at the Mena plant, were real or, as the General Counsel suggests, concocted as a vehicle of [sic] disguise threats to close the Mena plant, is not critical to the ultimate resolution of the complaint allegations based thereon. I am pursuaded by the record evidence that USEM had problems and there was some urgency to solve

these problems for it to be a profitable division of Emerson. However, unchallenged record evidence also conclusively establishes that the Respondent seized upon these problems to interfere with, restrain, and coerce its employees in the exercise of their Section 7 rights in violation of Section 8(a) (1) of the Act.

According to the testimony of Montgomery, he returned to Mena, [sic] the day following the Milford conference and telephoned Robert Partain, personnel manager at the Durant plant, and acting industrial relations manager at the Mena plant, requesting that he come to Mena and assist in solving their problems. Partain advised Montgomery that at the relatively small Durant plant; [sic] 150 employees, they were holding meetings with all the employees and advising them of their precarious situation. Partain agreed to come to Mena late on Wednesday following the meeting with all the Durant employees.

When Partain arrived at Mena, Montgomery called a meeting of his management staff and advised them of the problems at Mena as he had learned at the Milford meeting. The following day, September 6, Montgomery and Partain assembled all the Mena employees, unit and non-unit, by shifts and told them bluntly that the Mena plant was one of four in USEM that was under consideration for closing unless it became profitable to Emerson. Montgomery identified five particulars: productivity; quality; tooling; maintenance; and energy conservation, in which the plant needed to improve and solicited employees to volunteer to serve on employee committees in one of these areas. Montgomery did not allude to the Union activity at the Mena plant at this meeting, but couched the possibility of its closing solely in economic terms.[4] According to Montgomery, about 85

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[4]Many witnesses testified regarding this September 6, meeting, only two of which, Kenneth Halcumb and Stanley House, testified that Montgomery injected the Union activity at Mena into his remarks. Neither Halcumb nor House were certain that it was this meeting rather than a later one where Montgomery made the remarks attributed to him. The preponderance of record evidence convinces me that there was no suggestions or mention of the Union at this meeting.

percent of the Mena employees participated in this program and he received more than 600 suggestions. Montgomery testified that the response of the employees was so great that he and his staff were not competent to analyze and coordinate the program. He contacted Bill Roof, an industrial engineer of some 30 years experience with Emerson, and solicited his assistance in coordinating this program.

When Roof arrived at Mena, the decision was made to give the employee participation program, which has been used at other USEM plants, a name. Roof suggested, and Montgomery adopted, T.I.P., total improvement program, as the name. Thereafter the employees participating in the program met in groups by shifts.

The complaint alleges that Montgomery by telling the employees on September 6, that the Mena plant could be closed, and his inviting them to participate in the program to help solve the problems constituted an unlawful threat to close the plant because of the union activity and a solicitation of employee grievances with an implied promise to rectify them. While there is a strong suspicion that the Respondent seized upon the asserted precarious status of the plants in USEM to engage in the scare tactics suggested here in order to interfere with the employees [sic] Section 7 rights, I am pursuaded that Montgomery's remarks on September 6, and the subsequent involvement of the employees in the T.I.P. program did not violate Section 8(a)(1). Although the election had been scheduled at that time and the Respondent was aware that the union activity was peeking, [sic] Montgomery carefully avoided mentioning the union or the election in connection with possible reasons for the closing. The same is true with subsequent meetings involving development of the T.I.P. program. When matters were brought up which might constitute a grievance, i.e. a cut in labor grade, they were dismissed as being outside the scope of the five problem areas with which they were concerned.

The complaint alleges that in speeches to all employees on October 3, Montgomery threatened plant closure because of the

union activity and implied the inevitability of strikes and violence if the employees selected the union, and that Russ Hale threatened plant closure because of the union activity in speeches to all employees on October 4. In the same vein it is alleged that Respondent's agent, Derwood Brett, threatened plant closure in an article and editorial published in the Mena Evening Star on October 4.

In order to assess the impact of the conduct alleged here which constitutes a theme of clear unlawful interference, restraint and coercion of the employees [sic] Section 7 rights, it is necessary to set forth some intervening events. A week or so after returning from Milford, Montgomery attended a local Lions Club meeting where he was asked to comment on rumors that USEMs [sic] Mena plant might be closed. After asking that his remarks not be quoted, based upon the testimony of Montgomery and Brett Montgomery told the group essentially what he had told the employees concerning the reasons for possible closure and the steps being taken to try to avoid it. Montgomery was asked if the union activity at the plant had any bearing on its closing. According to Montgomery, he told them "those were two separate problems and that one had no bearing on the other." However, Montgomery continued that in his opinion the union was not needed since the campaign was causing dissention and diverting everyone's attention away from solving their operational problems. Montgomery added that the important question was not whether or not there was a union, but whether they could solve their problems.

Immediately after this meeting, Derwood Brett, publisher-editor of the Mena Evening Star, requested permission to publish an article based upon Montgomery's remarks. Montgomery denied permission until he could check with his corporate attorneys. It was not until early during the week of the election that Montgomery authorized Brett to publish an article based upon his remarks. The publication of this article and the editorial coincided with the meetings held with the employees by Montgomery and Hale wherein the theme of strike violence and

the inevitability of the plant closing because of the union was developed.

On the front page of the October 4, [sic] edition of the Mena Evening News under Brett's by-line, he published an article headlined "Beginning January 1, 1979 U.S. MOTORS MAY CLOSE". The article does not mention Montgomery but purports to quote L. L. Morrow, who appears to be a member of the Mena Industrial Development Board, and was instrumental in pursuading Emerson to build the plant at Mena. While the article deals largely with the prospect that the plant would very likely close for economic reasons and the impact it would have on the community, Morrow is quoted as saying, . . . "U.S. Motors might not be able to 'turn this thing around' with the problems they are having with efforts to unionize the plant. I can really see no good the union would do out there. We see regularly in the press where violence and turmoil is normal for union operations nowadays". In the same edition Brett published an editorial dealing in large part with the theme that unionization of the Mena plant would inevitably lead to strikes and violence and the closing of the plant. He stated "the issue is more than union or no union—it could be plant or no plant."

Prior to dealing with the General Counsel's contention that Brett was acting as Respondent's agent in publishing these items which constitute an unlawful threat of plant closure, or in the alternative, this was third party conduct which the Respondent had a duty to disavow, a discussion of the October 3 and 4 meetings with the employees may be helpful. There is little dispute concerning the October 3 meetings with the employees which were conducted by Montgomery and industrial relations manager Robert Partain. Essentially all the unit employees were summoned in groups of about 30 to the south conference room where Montgomery and Partain addressed them concerning the Union and the forthcoming election. Displayed around the room were numerous posters, newspaper clippings and pictures dealing with strikes, violence and plant closures, particularly the closing of a plant in Shelbyville, Tennessee. While the record is not clear,

it appears that at each of these meetings Montgomery's opening remarks were to the effect that he could be spending his time better trying to solve the plants [sic] problems and keep it open, but that it was necessary for him to talk about the union. He told them if the Union came in he would have to divide his time between preparing for negotiations and solving their problems to keep the plant open. He and, or, [sic] Partain alluded to the posters and newspaper clippings and stated that of the 18 Emerson plants that had been closed, 13 were Union. There was a poster outlining the length of strikes by I.A.M. at Emerson plants and Montgomery told them that I.A.M. had to strike for every contract that it had gotten at an Emerson plant.[5] In at least one meeting, in response to an employees [sic] question as to whether the plant would close if the Union came in, Montgomery said the "question in Mena was not union or no union but plant or no plant."

On October 4, USEM's president, Hale, addressed the employees on each of the three shifts, as did two other company officials. Hale talked about the company's operational and financial problems, and alluding to a union handbill stating that the company's T.I.P. program was just "sweet talk" a "sham" and "a psychological trick," asked the employees if I.A.M. were the type of union that would help or hurt them. He stated that it was a bad time for the I.A.M. to try to organize the Mena plant; that he had enjoyed coming to Mena and meeting the people, but if he had to make the decision to close the plant he would make it.[6]

As indicated above, it appears that with the exception of a number of alleged instances of individual interrogation and

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[5]The Respondent argues that this was in response to the Union's claim that it secured 98 percent of its contracts without a strike.

[6]I have not endeavored to set forth all versions of the eight employee witnesses and that of Montgomery and Hale, with respect to this meeting. The findings as to what Hale said at these meetings made above are not in dispute. Only one witness, Cogburn, testified that Hale made the direct statement that if the Union came in he would close the plant. I do not credit Cogburn in this respect.

threats discussed below, the Respondent did not engage in any organized campaigning until the week of the election. However, for a month prior to the election management officials had been telling the employees that it must improve its profit factor or there was a possibility that the Mena plant might be closed for economic reasons. As found above, there is some evidence supporting the Respondent's contention that the Mena plant was unprofitable and would have to improve in order to remain open. The newspaper article and editorial, and the comments of Hale and Montgomery, here under consideration must be assessed in the context of Respondent's operational problems.

The newspaper article and editorial, as did Hale and Montgomery, stated that if the plant closed it would be for economic reasons. The central theme of these written and oral statements clearly conveys the threat that the election of union representation at USEM in Mena would inevitably bring strikes and violence and just as inevitably lead to the closing of the Mena plant. The lip service paid to closing for economic reasons does not disguise these threats. I am convinced, and I find, that Respondent exaggerated the plight of the Mena plant as a vehicle to threaten its employees with plant closure if the union won the election. The statement to the effect that in Mena the question was more than union or no union, but plant or no plant, which was apparently coined by Montgomery at the September Lions Club meeting and used by Brett in his editorial and again by Montgomery in his meetings with the employees on October 3, can leave no doubt in an employee's mind that selection of the Union at Mena places his job in great peril. It is well settled that such "serious harm" statements tend to coerce employees in the exercise of their Section 7 rights. Community Cash Stores, Inc., 238 NLRB No. 029 [sic]. Cf Crysler [sic] Airtemp South Carolina, Inc., 224 NLRB 427.

Turning to the question of whether Derwood Brett was acting as an agent of Respondent in his October 4 publication, and if not, whether Respondent had a duty to disavow the statements. On the facts here, I find that Brett was acting as an agent of the

Respondent in the conduct of Respondent [sic] campaign. First, Montgomery addressed the Lions Club in early September but declined to give Brett permission to publish an article based upon his remarks until the week of the election which coincided with the Respondent's campaign.[7] From reading the article Brett published, one might ponder why Brett sought Montgomery's permission, since the article does not quote or mention Montgomery or attribute any of the statement to him. It is clear that Montgomery gave Brett permission to print something, apparently without reserving and [sic] right to review the article before publication. The theme of the article and editorial are identical with the theme of the remarks made to the employees by Montgomery and Hale on October 3 and 4. Thus, far from disavowing the import of these printed articles, the Respondent accentuated the threats in its October 3 and 4 meetings. See Hamburg Shirt Corporation, 156 NLRB 511, wherein the administrative law judge cited the Supreme Court's language in International Association of Machinists, Tool and Die Makers Lodge No. 35 (Serrick Corp.) v. N.L.R.B., 311 U.S. 72, 80:

> The employer . . . may be held to have . . . [violated the Act] even though the acts of the so-called agents were not expressly authorized or might not be attributed to him on strict application of the rules of respondeat superior. We are dealing here not with private rights . . . nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence.

Accordingly, I find as alleged, the October 4 publication of the Mena Evening Star, as discussed above, Montgomery and Hale's statements to the employees on October 3 and 4, respectively,

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[7]Brett testified that he would have published the article even without Montgomery's permission.

Respondent unlawfully threatened its employees with plant closure, and it further coerced its employees in October by Montgomery's telling them that the "union had a 100 percent strike record with the Respondent and impled that if the employees voted the union in violence would result."

The complaint alleges that Respondent, by its supervisor Philip Crosby, about June 16, and its supervisor Danny Titsworth, during August, promulgated and enforced an overly-broad invalid no-solicitation rule, and that Titsworth threatened to take disciplinary action for violating the rule. The Respondent contends that it had maintained a valid no-solicitation rule for a number of years and that employees were advised of the rule when they were hired and the rule had been posted on its bulletin board. Received into evidence is a copy of the purposed rule:

WE ALL KNOW THAT NO MATTER WHAT ISSUE IS INVOLVED, UNWANTED SOLICITATIONS DURING WORKING TIME CAN RESULT IN IRRITATION AND PERSONAL INCONVENIENCE. IN ADDITION, WHERE SUCH ACTIVITY TAKES PLACE DURING WORKING TIME, WE FEEL THAT THERE CAN BE AN ADVERSE EFFECT ON PRODUCTION. ACCORDINGLY, TO MAINTAIN HARMONY AND COOPERATION AND AVOID ANY CONFUSION AS TO THE MEANING OF OUR CURRENT SOLICITATION-DISTRIBUTION RULE, THE FOLLOWING REVISION HAS BEEN ADOPTED.

NO SOLICITATION/NO DISTRIBUTION

EMPLOYEES WILL NOT BE PERMITTED TO SELL OR SOLICIT IN ANY PLANT AREA DURING THEIR WORKING TIME. EMPLOYEES WILL NOT BE PERMITTED TO DISTRIBUTE CIRCULARS, HANDBILLS OR LITERATURE OF ANY TYPE DURING

THEIR WORKING TIME OR AT ANY TIME IN ANY WORKING AREA OF THE PLANT.

/s/ JIM MILLSPAUGH
INDUSTRIAL RELATIONS MANAGER

The ónly evidence as to when this rule and its explanation was promulgated was based upon the fact that it was signed by Jim Millspaugh, industrial relations manager, who had left the company more than a year before the advent of the Union. There is no evidence that the rule was ever enforced. However, as argued by the Respondent in [sic] brief, there is no evidence that the rule was ever violated. While two employees [sic] witnesses testified that they had never seen, or been informed of, the rule, it appears that the General Counsel is not contesting the existence or validity of the written rule. Rather, these allegations are predicted upon testimony of oral communications of an invalid rule.

In mid June, John D. Williams, a patrol inspector with the Respondent, was inspecting parts on the veridisc and talking with employee Thomasson, [sic] Williams was making notes of his inspection on a small note pad with an I.A.M. logo. He was observed by supervisor Philip Crosby, who testified that he thought the note pad was a union card and that Williams was soliciting Thomasson to sign the card. Crosby approached Williams, who quickly put the pad in his shirt pocket and went to a parts basket and began checking parts. According to Williams, Crosby came up to him and told him he would regret having to let him go for passing out union cards, but that's exactly what he would do if he caught him again. Williams initailly [sic]testified that he immediately denied that he was passing out union cards. However, on cross-examination, and in agreement with Crosby's testimony, it was not until the following day that he went to Crosby and denied passing out cards and explained what he was doing. Both Crosby and Williams testified that Williams told Crosby that he was protected by the National Labor Laws. Apparently the day of the incident, Crosby reported it to general

foreman Joe Monaco, and looked at the section of the Act referred to by Williams. The following day Williams denied to Crosby that he had union cards and explained what he was doing. Crosby took Williams to Monaco's office where Williams gave the same explanation. Both men then apologized to Williams for the incident.[8]

Williams denied that he had seen or was aware of a no-solicitation rule except that some employees had informed him of such rule.

Employee Paul Herrman testified that about mid June, or six weeks after the union campaign started, supervisor Danny Titsworth came to him and told him he was going to have to give him a warning. Titsworth told him the company had a no-solicitation rule and he could not solicit on company time. He denied soliciting except during lunch breaks and after work. Titsworth told him he could not solicit during breaks since the company continued to pay for that time. Titsworth told him he had received a number of complaints about his talking to people and if it continued he would have to punish him.

According to Titsworth, he received complaints from two new employees that Herrman was talking with them about the Union in the shop. He then went to Herrman and explained the no-solicitation rule; that he could not solicit "during the time we were supposed to be working." Herrman denied that he had engaged in any solicitation and asked Titsworth if he were accusing him of such. Titsworth told him no but, that if he received any more complaints he would have to take disciplinary action.

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[8]The foregoing is not in dispute except that by Crosby's version of the incident, he merely asked Williams not to put him on the spot by soliciting in the plant on company time. He denied that he threatened any disciplinary action. I agree with the Respondent that it makes little, or no, difference which version is credited. By Williams [sic] version there is a direct threat of punitive action, and by Crosby's, there is a clearly implied threat of such action.

First, I am convinced and find, that Respondent had in effect the valid no-solicitation rule set forth above. Neither Williams nor Herrman were impressive witnesses. As noted above, Williams initially insisted that he immediately denied to Crosby that he was soliciting, and it was not until Respondent's attorney extracted from Williams the admission that on the day before the hearing, during an interview with him, Williams had told him for the second time that it was not until the next day that he made such denial, that Williams changed his testimony to comport therewith. Furthermore, Williams [sic] testimony appeared, at times, to be confused, possibly due to the fact that he had little present recollection of what had occurred the previous June. With respect to Herrman, his memory of the events to which he testified appeared to be vague. His denial of any knowledge of a no-solicitation rule has some doubt cast upon it by his testimony that he denied to Titsworth that he was talking about union except at lunch and after work. Be that as it may, the testimony of Crosby, Titsworth and other management officials, that such rule had been in existence for several years and employees had been informed of the rule upon hire and by posting in the plant, is more persuasive, and I so find.

Turning first to the Crosby-Williams incident. I find the General Counsel has not proven the allegations of paragraph 14(a) and (b) of the complaint which this evidence was designed to support. From what the undisputed facts demonstrate, I find Crosby had reasonable cause to believe that Williams was violating the no-solicitation rule. The note pad upon which Williams was writing was similar to the I.A.M. authorization cards. Upon Crosby's approach, Williams rapidly concealed the note pad and departed Thomasson's company. These acts could reasonably appear to indicate that Williams had something to hide. Williams [sic] failure to immediately deny solicitation, but instead alluding to protection by "National Labor Laws" could reasonably further indicate that Williams was engaged in union activity. On these facts, Crosby's telling Williams that he would regret having to let him go for passing out union cards, and that's

what he would do if he caught him again, is not a violation of the Act.

In Hildebrand Company, 198 NLRB 674, cited by the Respondent, the Board held that Respondent did not violate the Act when, upon recalling a laid off employee, it read him the following message:

> When you were here last, we were advised by some of the employees that you were soliciting cards and discussing union matters during working hours. You were told during a warehouse meeting that union problems could be discussed at any time except during working hours. Since you did not heed this policy, I must tell you that we are glad to have you back on the job but must advise that if you work on union matters during working hours when you are paid to do work for the company, that we will consider this cause for discharge.

The Board, reversing the Administrative Law Judge, concluded that the above statement did not violate the Act, but was merely a statement that it would police the rule against violations. This conclusion was apparently predicated upon the rationale that where an employer has reasonable cause to believe that an employee has violated its rule, here based upon reports by other employees, that it may advise the employee that violations will be considered cause for discharge.

Accordingly, when Crosby had reasonable cause to believe that Williams was in violation of the rule, his statements to him to the effect that he would regret firing him for such activity but would do so if he caught him again are not unlawful.

Now for consideration of the Titsworth-Herrman incident. I consider Titsworth's denial that he told Herrman that he could not talk about the union during breaks to be far more credible than Herrman's testimony to the contrary. Based upon employee reports that Herrman was talking about the union in the shop, under the rationale of Hildebrand, supra, Titsworth's reminding

Herrman of the no solicitation rule does not violate the Act. However, Titsworth's telling Herrman that if he received further complaints he would have to take disciplinary action is unlawful and tended to coerce Herrman in the exercise of his Section 7 rights. The distinction, as I perceive it, between Titsworth's threat to take disciplinary action and the statements made by Crosby and the supervisors in Hildebrand, is simply that Titsworth threatened disciplinary action based upon employee reports and not based upon a determination that Herrman had in fact violated the rule.

Accordingly, I find the threat to be a violation of Section 8(a)(1) as alleged.

The complaint alleges that about October 4, supervisor Joe Simmons threatened employees with plant closure because of their support for the Union. A short time before the election, employee Roy Cogburn's supervisor, Joe Simmons, approached Cogburn at his work station and asked him if he had read the company literature mailed to him concerning the Union. Cogburn told him he had, and upon being asked what he thought about it, told Simmons he "thought it was all a fairy tale, and [I] didn't believe it." Simmons told Cogburn the union didn't care anything about him, "they're just a business". Simmons then asked Cogburn what he thought the Union could do for him and Cogburn spelled out several benefits which he thought the Union could get. Simmons told Cogburn the Company would not negotiate for those benefits, but would close first. Simmons continued by asking Cogburn if he would vote for the union if it meant everybody's job at the plant. Cogburn responded that he did not believe that it did.[9]

Simmons admits asking Cogburn if he had read the company literature and telling him he didn't think the union would do him any good. Simmons does not deny asking Cogburn what he though the union could do for him, but testified that Cogburn

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[9]The foregoing findings is [sic] based upon Cogburn's credited testimony.

named a few items he thought the union could get. He did not recall the items, but stated that "whatever it was, [sic] was ridiculous". Simmons testified that he told Cogburn the company wouldn't give more than they could afford and that if the union got in, "and they got a strike that we'd all, may lose our jobs." Simmons testified he didn't believe he asked Cogburn how he was going to vote because he already knew.[10]

Although the foregoing incident is alleged in the complaint only as a threat of plant closure, in view of the fact that the entire conversation was fully litigated at the hearing, in addition to a threat of plant closure, I find and conclude, [sic] that there was coercive interrogation and a threat that the Respondent would not bargain in good faith.

The complaint alleges that about June 17, supervisor Philip Crosby coercively interrogated employees concerning their union activity and that about June 8 and 15, supervisor Bill Warren interrogated and restricted an employee to his work area to induce its employee not to support the union. The General Counsel attempts to support both allegations by the testimony of John D. Williams, whom, heretofore I have not credited when his testimony was at odds with credible testimony. With respect to the allegation of interrogation there is little conflict between the testimony of Williams and Crosby. The findings in this regard is based upon Crosby's testimony. The first part of June, Williams reported to work with a new "pocket protector" and a new "pen", each bearing the I.A.M. logo. Crosby went to Williams and told him he knew he was involved in the union, and he hoped it wouldn't interfere with his inspection, and that he wouldn't be doing anything on Company [emphasis supplied] time involving

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[10]As noted above, I credit Cogburn's more cogent and detailed version of this conversation. Simmons' recollection of the conversation was vague and to an extent inconsistent. For instance, he testified that he did not know whether Cogburn mentioned specific benefits, but added, "whatever it was, [sic] was ridiculous." Similarly, he couldn't recall whether Cogburn said he had read the company literature, but added "[A]nyway, he didn't believe it."

the Union. Williams replied that the fact he had the I.A.M. protector and pen didn't mean he was for or against the Union.

The Respondent argues, as to this incident and all the 8(a)(1) allegations discussed below, that such are innocuous and isolated and do not rise to the level of unfair labor practices or objectionable conduct when addressed to known union supporters. In P.P.G. Industries, Inc., 251 NLRB No. 156 (1980), the Board recently reaffirmed its position that inquiries which probe into employee's [sic] union support reasonably tend to coerce employees even when addressed to those who have openly declared their union sympathies, and as it held in Pasceo, A Division of Freuhauf Corporation, 237 NLRB 878, and Anaconda Co. - Wire and Cable Div., 241 NLRB 187, even in the absence of threats of reprisals or promises of benefits. In doing so, the Board specifically overruled its Decision [sic] to the contrary in Stumpf Motor Company, Inc., 208 NLRB 431 and B. F. Goodrich Footwear Company, 201 NLRB 353.

Accordingly, I find that Crosby's comments to Williams concerning his involvement with the union as indicated by his union inscribed pocket protector and pen, constitutes coercive interrogation and his admonishing him not to do anything concerning the union on company time constitutes an unlawful broadening of the no-solicitation rule.

With respect to the Warren incident, Williams testified that in June he was in the area of the "NC checker" which was supervised by Bill Warren. Warren approached Williams and told him that he knew he had been talking about the union to employees in that department — "he was not saying that I was doing it then, but that I had been," and that since the machine was set-up, no inspection personnel was required and he should leave the area. According to Williams, a patrol inspector, he normally had occasion to be in that area three or four times a shift and had never been told to leave before. Warren did not testify.

While Williams testified to the reason he was in the area, he does not contend that his presence there was for a legitimate

reason once the machine was set-up. Also Williams did not deny to Warren that he had been talking with employees about the Union while on that end of the plant as Warren had accused him.

Even in the absence of a denial or explanation by Warren, I find and conclude, that the General Counsel has failed to sustain the allegation that this incident violates the Act.

The complaint alleges that during May, supervisor Donny [sic] Titsworth interrogated employees concerning their union acticities. The testimony of Paul Herrman is presented in support of this allegation. Herrman testified that about once a week during May and June, Titsworth came to his desk and asked him how he felt about the union and whether for or against it. On another occasion Titsworth asked him if he had made up his mind and showed him a fact sheet prepared by the company for supervisors. On one occasion Titsworth asked if he had read that the average strike at U.S. Motors was eight weeks and if he were still going to go for it.

Titsworth admitted having several conversations with Herrman during May and June where the subject of the union came up, but did not state who initiated such subject. According to Titsworth, Herrman seemed unsure about the union and Titsworth invited Herrman to ask him any questions that he wanted and if he didn't know the answer he would find out. He also admitted that he showed Herrman the supervisor's Fact Book about the union and Herrman told him he had already "looked into it," and had "decided he was going to go with the union."

As heretofore noted, the demeanor of Herrman testifying under oath was not favorable in large part, whereas Titsworth's testimony had a ring of truth. While Titsworth specifically denied that he asked Herrman how he was going to vote in the election or how he felt about the union, his testimony was very general with respect to how the subject of the union was initiated into their discussions. In any event, the Board has held that where supervisors engage employees in conversations about the union

where such conversations are designed to ascertain their union sympathies, such conduct constitutes coercive interrogation whether or not couched as an interrogatory.

Accordingly, on the facts here, Titsworth's engaging Herrman in conversations about the union on several occasions and offering to obtain answers to any questions he might have, was clearly designed to ascertain his union proclivity and convince him to the contrary. Thus, while there were no threats of reprisals or promises of benefits in connection therewith, I find under the rationale of P.P.G. Industries, Inc., supra, that such conduct violated Section 8(a) (1) of the Act.

The complaint alleges that in September, supervisor Pete Oliver interrogated employees concerning their union activity and solicited employees to persuade fellow employees not to support the union. Testimony in support of these allegations was elicited from James Fletcher.

According to Fletcher, he was hired by the Respondent for the second time in August by general foreman Pete Oliver and personnel manager Bob Irish. During the employment interview, Fletcher told Irish that he understood the union was trying to get into the plant again and Oliver replied that they did not need a union, that it would be the worst thing they could have. I find that Fletcher volunteered to Oliver that he had voted against the union in the last election. According to Fletcher, Oliver then asked him to talk to his brother who was also an employee at USEM.

According to Oliver, whom I credit,[11] he interviewed Fletcher for a job and after hiring him, Fletcher commented on a place that he had worked in Oklahoma where the union was campaigning. Oliver told him of the current campaign at USEM

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[11] Fletcher's testimony is disjointed and, at times, incoherent, which indicates that he had little present recollection of what was said at his employment interview. He had to be led by the General Counsel into making some of the most critical statements.

at which time Fletcher volunteered that he did not vote for the union the last time. Oliver replied he was glad to hear that and hoped he felt the same way this time, and he hoped his brother felt the same way. Fletcher volunteered to talk to his brother and Oliver said that would be appreciated. Fletcher did not complete a new employment application on this occasion.

On the facts as found here, the General Counsel has failed to sustain his burden of establishing by a preponderance of evidence that the Act was violated during this employment interview. It was Fletcher, the applicant, not Oliver, the supervisor, who injected the union into the conversation. Fletcher volunteered his union sentiments during the last election, and Oliver's comment that he hoped he felt the same way "this time" falls short of interrogation. Similarly, Oliver's telling Fletcher that he would appreciate Fletcher's volunteered service of talking with his brother, falls short of soliciting him to persuade his brother not to support the union.

The complaint alleges that about October 3, supervisor Charles Vaught unlawfully interrogated employees concerning their union activities and that during July he coerced employees by telling them that if the union were voted in it would never get a contract and that the company would pay as much without a union just to keep it out.

The interrogation allegation is based upon the testimony of Maxine Bates who testified that on October 3, Vaught came to her table and after greeting her, asked, "well how is the election going on Friday?" She replied "we'll know Friday." Vaught then asked "are you for the company or are you for the union?" She replied that it wouldn't be a secret ballot if she told him.

Vaught admitted to the interrogation of Bates on a number of occasions during the campaign, testifying that they had been friends for a long time and she made no secret of how she felt about the union. He testified that he asked her if she had decided to vote for the company and admitted asking her how the election was going to go. The foregoing clearly constitutes unlawful

interrogation under P.P.G. Industries, Inc., supra.

The remaining two allegations with respect to Vaught, [sic] are based upon the testimony of James Bowling. Bowling testified, not disputed by Vaught, that Vaught came to his work station and told him Partain had asked him to talk with him and instructed Bowling to accompany him to supervisor John Holomshek's office. Although the record is not clear, it appears that employee Laren Dean had reported that Bowling had talked with him about the union on working time. Vaught apparently told Bowling this and Bowling admitted that a conversation with Dean had gotten around to the union and told Vaught he would not do it again. According to Bowling, Vaught then alluded to the problems the Milford plant employees had with the union and told him the company would pay as much as they could get with the union just to keep the union out.

Vaught admitted the foregoing except that he testified that he told Bowling the company would pay as much as they could afford to pay, with or without a union.

Vaught's testimony is far more credible than that of Bowling, whose testimony was not altogether lucid or cogent. Accordingly, I credit Vaught, and find that his comment that the company would pay as much as it could afford with or without a union is not coercive and does not violate the Act. Bowling gave no testimony concerning a threat that the union would never get a contract. Accordingly, these allegations are dismissed.

The complaint alleges that supervisor John Holomshek, during June, threatened employees with the loss of benefits and wages if the Union were voted in. This allegation is based upon the testimony of Willard Richardson and Stanley House. According to Richardson, some time in June, Holomshek accompanied him to the office of supervisor Paul Havens where Havens discussed with him unions in which Havens had been a member.[12] As Richardson and Holomshek were returning to

[12]Havens [sic] conduct is not alleged as an unfair labor practice.

Richardson's work area, Holomshek told Richardson "... that if the people out there asked for a dollar an hour increase, the plant would close down."

Holomshek, who left Respondent's employ on July 28, testified with respect to this incident, that as he and Richardson were returning to Richardson's work area, Richardson made a statement to the effect that the Union would get them a dollar an hour increase. Holomshek replied that Emerson was a pretty big outfit and were [sic] in business to make money and if it came to the point where the plant would lose money by granting an across the board increase of a dollar an hour, he "would imagine they would think seriously about closing it down."

I credit Holomshek's more detailed version of this incident. While I do not believe that Richardson was deliberately bearing false witness, I am convinced that his version failed to reveal all the surrounding circumstances of the conversation. If Holomshek's remarks constitute a violation of the Act, it is not a threat of loss of benefits, as alleged, but a threat of plant closure. However, the issue was fully litigated without objection and will be considered under the criterion of threat of plant closure. In my opinion, Holomshek's remark, that if the plant lost money by having to give a dollar an hour increase he thought Emerson would think seriously about closing it, is not an unlawful threat of plant closure. This statement is similar to that of the Employer in Loomis Courier Services, Inc., 235 NLRB 534, . . . "that it would close the branch should the Union insist on demands that would cause a marked increase in costs." In that case, as here, it appears that the branch was already in a somewhat precarious economic situation. The Board found the Respondent's statement to be lawful. Here, Holomshek was merely expressing his opinion of an option he thought Respondent might consider if wage demands made the plant unprofitable.

According to Stanley House, who was apparently a close personal friend of Holomshek, one day in June as he was returning from lunch, Holomshek, [sic] looked at him and shook

his head and said "I can't believe this." House asked what, and Holomshek said "I can't believe you are mixed up in this union deal." House asked what was wrong with it, and Holomshek said "well . . . you know you're going to lose everything you've got. . . . You're going to go back to zero and everything starts all over again."

Holomshek admitted a conversation with House about the Union where they discussed negotiations, bargaining and contracts. He told House negotiations start at zero and fluctuate up and down from there.[13] He testified that he told House that the union could possibly bargain away some of the benefits they already had, "in order to gain something they really have their mind set on."

Holomshek was a very impressive witness and I credit his version of this incident over that of House, who testified that he made notes of the conversation and turned them over to the union. The Union claimed the notes were in Dallas, Texas, and were not available at the trial for purposes of cross-examination. Whether statements of "bargaining from scratch" or from "zero" are unlawful depends upon the context in which they are uttered. Generally, where, in context, the term indicates that existing benefits will be lost or reduced and the union must bargain to regain them, the statement is unlawful. However, where the statement indicates bargaining will start with all present benefits and some may be lost as a result of bargaining, the statements are lawful. Here, Holomshek explained what he meant by saying the Union could bargain away present benefits in order to get "something they really have their mind set on." Accordingly, I find this allegation has not been sustained and will recommend that it be dismissed.

The complaint alleges that in August supervisor Rick Selby threatened employees that if the union were [sic] selected at the

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[13]Holomshek testified that he meant bargaining would start from where they were. However, he does not contend that this is what he told House.

Mena plant the company would have to make an example out of it to keep the union out of its other plants, and as amended at the hearing, that about October 2, Selby interrogated an employee concerning his union activities.

Turning first to the alleged interrogation. James Craig Pate testified that on October 2, Selby came up to him and said, "How are you doing Pate?" Pate relied alright except for the wrestling, sic, [hassling] I'm catching back here." According to Pate, Selby talked on for awhile and then said "you ain't going to vote for that union are you?"

Selby admits a conversation with Pate on October 2, where he asked Pate, a known union adherent,[14] how things were going. Pate told him he wanted to talk with him and complained about "people riding [me] back there". Selby asked why he thought they were riding him and Pate said because he was going to vote for the Union. Selby told him he had a right to vote as he wanted and that others had a right to their opinion.

I cannot credit Pate's version of this incident based upon his testimony at the hearing. In October, prior to the hearing, Pate gave affidavits to the General Counsel and the Respondent wherein he stated only that Selby asked him how he was doing and he volunteered that he was going to vote for the union. Apparently, only a week or so before the hearing, he told the Counsel for the General Counsel that Selby had only asked how he was doing. It was not until the hearing that he remembered that Selby had asked how he was going to vote in the election. Accordingly, I cannot credit him. I find no unlawful interrogation in Selby's version of this incident, and recommend that it be dismised.

On the evening of the day in August when the election agreement had been signed, Selby went to the local Elks Lodge where he encountered employees Richard Milligan; [sic] Mel

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[14]Pate had I.A.M. stickers on his person and work station.

Epperson and Ray Baker, and informed them that the date had been set for the election. Milligan observed that he was glad it had finally come. According to Milligan, Selby talked about a union plant in which he had once worked and how he got to work when there was a strike. Selby also asked how they would feel if their children were starving. Apparently the union was the chief topic of discussion. Later, again according to Milligan, Selby said "well, there's one thing about it, that if this plant goes Union here, . . . well, they'll have to make an example out of this plant being Emerson in order to keep the rest of their plants from going Union." Neither Epperson nor Baker testified.

Selby testified that Milligan complained about his pay and having to drive an old car and said he thought it was time all that changed and that the union would get them a dollar or a two dollar raise. Selby replied that he didn't think that would happen and that Emerson had a lot of other plants and the Mena plant would be judged along with the others for profitability. He continued that the Mena plant was "having a crucial time," and there were a lot of other plants to be looked at and judged before any thing [sic] happened. Selby said in his opinion they could not afford to give everything the people said they wanted.

In my opinion, neither Milligan nor Selby deliberately prevaricated in reciting their recollection of what was said in this "bar" talk. As the Respondent observed in [sic] brief, from their testimony both Milligan and Selby appeared to be "big talkers." Selby's emphasis on the fact that Emerson had a great many other plants, which were known by all to be both Union and non-union, against which the Mena plant must be judged, might well have suggested to Milligan that Selby was indicating that Emerson might make an example out of the Mena plant. In the context in which this discussion occurred, I am convinced, and I find, the statements were not coercive and did not violate the Act.

The complaint alleges that in September supervisor La Dayrl Knight threatened employees that the company would not negotiate with the Union and that employees would be discharged because of their union activities.

These allegations are based upon the testimony of Kenneth Halcomb that near the end of his shift on an evening in September, La Dayrl Knight walked up to him and, without any greeting, told him "that the company would not negotiate with the Union." Knight continued that "they would have to go on strike, and that he had a list of all the employees involved, that when we went on strike, the company would hire people to replace us." This, according to Halcomb was the entire conversation.

According to Knight, his routine was to tour the plant early in the shift, and on one occasion he stopped and talked with Halcomb, with whom he had been friends for several years. Halcomb asked Knight if the company was going to negotiate with the union. Knight told him they would have to negotiate. Halcomb responded that if they didn't negotiate, they [the employees] would go on strike and shut the plant down and there was nothing the company could do about it. Knight told him he didn't think they would force the issue by striking and if they did the company would hire employees to replace them.

I am constrained to credit Knight's more detailed and believable version of this incident. Halcomb's version is not appealing. I find it highly unlikely that Knight would approach his friend and without greetings, make the statement attributed to him. Accordingly, I recommend that this allegation be dismissed.

At the trial the General Counsel was granted permission to amend the complaint to allege that about May 14, 1979, the Respondent by its supervisors Joel Anderson and L. J. Dugan violated Section 8(a) (1) and (4) of the Act by threatening its employees with loss of holiday pay if they participated in the instant hearing on May 29, 1978. At the hearing I dismissed this allegation as to L. J. Dugan for failure of proof.

This incident arises out of the company policy, not uncommon in industry, that for employees to qualify for holiday pay they must work the day before and the day following the holiday, or be

excused for good cause. The trial herein commenced on May 28, the day following the Memorial Day holiday, on which the plant did not operate. According to A. D. Davis, about May 14, he approached Walt Brotherton, production manager, and, because of rumors he had heard, told Brotherton he was involved in this hearing and asked if he would receive holiday pay. Brotherton told him he did not know but he would check with personnel and find out. A short time later Davis advised his supervisor, Joel Anderson, that he was involved in the hearing. Anderson told him "you know you may not get your pay, your holiday pay." Davis told Anderson he thought he was misinformed, that he had already talked with Brotherton.

On Friday, supervisor Jim Foley told Davis, a second shift employee, that he would receive his holiday pay if he reported to work at the conclusion of his business at the hearing. It appears that the first shirt employees who were subpoenaed for the 1:00 p.m. hearing were required to report for work until noon in order to qualify for holiday pay.

I find nothing unlawful in Anderson's comment to Davis. At most these discussion indicate that some supervisory personnel were not familiar, [sic] with the holiday pay policy and aware that the Board issued subpoena constituted an excuse for holiday pay. Accordingly, this 8(a) (1) and (4) allegation is hereby dismissed.

IV. The Effects of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth above in connection with its business as set forth in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to disputes obstructing the free flow of commerce.

V. Conclusions of Law

1. Jurisdiction by the Board is properly asserted in this proceeding.

2. By interrogating its employees concerning their union membership, activities, desires; threatening its employees, directly and indirectly that it would close the Mena plant if the Union were selected as the employees collective bargaining representative; telling its employees, directly or indirectly that selection of the union at Mena would inevitably bring strikes and violence; orally promulgating an overly broad no-solicitation rule which could be interpreted as prohibiting employees from working for the Union on their breaks and lunch period; and threatening its employees that it would be futile to select the Union by telling them it would not bargain with the Union in good faith, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and Section 2(6) and (7) of the Act.

3. The Respondent has not otherwise violated the Act.

4. The conduct of the Respondent set forth above occurring between August 26 and October 6, 1978, considered in conjunction with the unfair labor practices occurring during the Union campaign prior to August 26, requires that the Board conducted election held on October 6, in Case 26-RC-5823 be set aside and that a new election be directed to be held at a time to be determined by the Regional Director for Region 26, after the effects of the unfair labor practices found herein have been remedied.

VI. The Remedy

Inasmuch as Respondent has been found guilty of violations of Section 8(1) (1) of the Act, which conduct interfered with, restrained and coerced its employees in the exercise of their rights guaranteed to them by Section 7 of the Act, I conclude from the totality of such unlawful conduct that Respondent should be required to cease and desist from such and any like or related conduct, and take certain affirmative actions in effectuation of the policies of the Act. Such affirmative action of Respondent shall be that it post the usual informational Notice to Employees, attached hereto as an Appendix.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:[15]

ORDER

Respondent, U.S. Electrical Motors, A Division of Emerson Electric, Co., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their union membership, activities and desires.

(b) Threatening its employees directly, or by implication, that it would close its Mena plant if the union were [sic] selected as the employees [sic] collective bargaining representative.

(c) Threatening its employees directly, or by implication, that if they selected the union to represent them at Mena, such action would inevitably bring strikes and violence.

(d) Orally promulgating an overly broad no-solicitation rule which could reasonably be interpreted as prohibiting employees from talking about, or working for, the union, on their own time, i.e. breaks and meal times.

(e) Threatening its employees that it would be futile for them to select the union to represent them by telling them that it would not bargain in good faith with the union.

(f) In any like or related manner interfering with, restraining and coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

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[15]In the event no exceptions are filed, as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(g) The Board conducted election in Case 26-RC-5823 be set aside and a new election be directed and held as provided in Section V, item 4, of this Decision.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Post at its Mena, Arkansas, plant, copies of the Notice to Employees attached hereto marked "Appendix".[16] Copies of said notice on forms duly provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by other material.

(b) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

(c) The complaint, insofar as it alleges violations not found above, is dismissed.

IT IS FURTHER ORDERED that the election held on October 6, 1978, in Case No. 26-RC-5823, be, and it hereby is, set aside.

Dated, Washington, DC January 22, 1981.

ROBERT C. BATSON
ADMINISTRATIVE LAW JUDGE

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[16]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading [sic] POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

"APPENDIX"

NOTICE TO
EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Act gives all employees these rights:

To engage in self-organization;

To form, join or assist unions of their choosing;

To bargain collectively through representatives of their own choosing;

To act together for collective bargaining or other mutual aid or protection; and

To refrain from any and all these things.

WE WILL NOT coercively interrogate our employees concerning their union activities.

WE WILL NOT threaten our employees directly, or by implication that we will close the Mena plant if they select the union to represent them.

WE WILL NOT threaten our employees directly, or by implication that selection of the union would inevitably result in strikes and violence.

WE WILL NOT promulgate any no-solicitation rule which can reasonably be interpreted as prohibiting our employees from talking about, or working for, the Union during their non-working time, including breaks and meal period.

WE WILL NOT threaten our employees that it would be futile for them to select the union to represent them by telling them that we would not bargain in good faith with the union.

WE WILL NOT in any like or related manner interfere with, restrain and coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

U.S. ELECTRICAL MOTORS, A
DIVISION OF EMERSON ELECTRIC CO.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower - 8th Floor, 1407 Union Avenue, P. O. Box 41559, Memphis, TN 38104. Telephone: (901) 521-2725.

Office - Supreme Court, U.S.
FILED
MAY 9 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1642

In the Supreme Court of the United States

OCTOBER TERM, 1983

U.S. ELECTRICAL MOTORS, A DIVISION OF EMERSON ELECTRIC CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILFORD W. JOHANSEN
Acting General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the court of appeals correctly declined to review, for lack of a final order, a decision of the National Labor Relations Board setting aside a representation election and directing a new election, where that decision was based on conduct that the Board also found to be unfair labor practices and the Board's unfair labor practice findings and order were before the court for review under Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f).

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Statute:

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1642

U.S. ELECTRICAL MOTORS, A DIVISION OF EMERSON ELECTRIC CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 722 F.2d 315. The decision and order of the National Labor Relations Board (Pet. App. 13a-60a) are reported at 261 N.L.R.B. 1343.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1983. On February 17, 1984, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including April 7, 1984, and the petition was filed on April 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 10 of the National Labor Relations Act, 29 U.S.C. 160, provides in pertinent part:

> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any * * * unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter * * *.
>
> * * * * *
>
> (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. * * *
>
> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

Section 9(d) of the National Labor Relations Act, 29 U.S.C. 159(d), provides in pertinent part:

> Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

STATEMENT

1. The International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) filed a petition to represent employees at petitioner's Mena, Arkansas, plant. On October 6, 1978, the Board conducted an election, and the Union lost by a vote of 213 to 200. The Union filed objections to the election and also filed unfair labor practice charges based on petitioner's conduct during the election campaign. The representation and unfair labor practice cases were thereafter consolidated for hearing. Pet. App. 25a-26a.

The Board, substantially adopting the decision of the Administrative Law Judge, found that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), during the course of the organizing campaign by interrogating its employees concerning their union activities; by threatening, directly or indirectly, to close the plant if the Union were selected; by threatening that selection of the Union would result in strikes and

violence; by threatening to refuse to bargain in good faith if the Union were selected; and by threatening to discipline employees for alleged violations of a no-solicitation rule based solely upon complaints from other employees (Pet. App. 17a-18a, 32a-49a).[1] The Board's order required petitioner to cease and desist from the unfair labor practices found and from interfering with, restraining, or coercing employees in any like or related manner in the exercise of their rights under the Act (*id.* at 18a-19a).

In the representation portion of the consolidated proceeding, the Board sustained the Union's objections to the election based on the conduct that corresponded to the unfair labor practices found to have occurred after the representation petition was filed. The Board set aside the results of the election and directed that a second election be held. Pet. App. 17a, 19a-20a, 27a, 56a.

2. Petitioner sought review in the United States Court of Appeals for the Sixth Circuit of both the Board's unfair labor practice order and its decision directing a second election. The court enforced the Board's unfair labor practice order and held that it lacked jurisdiction to review the Board's decision directing the second election. Relying on this Court's decisions in *American Federation of Labor* v. *NLRB*, 308 U.S. 401 (1940), and *NLRB* v. *International Brotherhood of Electrical Workers*, 308 U.S. 413 (1940), as well as decisions of other courts of appeals, the court held that the direction of a representation election by the Board

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[1]The unfair labor practices found occurred at various times between May and October of 1978 (Pet. App. 32a-49a). The Board, in agreement with the ALJ, dismissed certain other allegations of unfair labor practice conduct and, reversing the ALJ, dismissed two additional allegations that a supervisor had imposed an invalid no-solicitation rule and that the editor of a local newspaper had acted as an agent of the company in making anti-union statements in the press (*id.* at 14a-16a, 49a-56a).

is not a "final order" within the meaning of Section 10 of the Act, 29 U.S.C. 160, and therefore not subject to direct review. The court observed that it is "uniformly held that since an order of the Board directing an election in a representation proceeding is not a 'final order,' it can only be challenged in the context of the Company's later refusal to bargain because of the asserted error in the Board's order" (Pet. App. 9a).

ARGUMENT

Petitioner does not challenge the Board's findings that it committed unfair labor practices during the initial organizing campaign. Its sole contention is that the court of appeals erred by failing to review the Board's decision directing a second election. There is no merit to that contention.

As the court of appeals correctly noted, this Court long ago established that Board decisions directing elections in representation cases do not constitute "final orders" subject to direct judicial review under Section 10(e) and (f) of the Act, 29 U.S.C. 160(e) and (f). *American Federation of Labor* v. *NLRB*, 308 U.S. at 409; *NLRB* v. *International Brotherhood of Electrical Workers*, 308 U.S. at 414-415; *NLRB* v. *Falk Corp.*, 308 U.S. 453, 459 (1940). Representation proceedings under Section 9 of the Act, 29 U.S.C. 159, are reviewable only after the Board certifies a bargaining representative and "the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative" and the Board orders the employer to bargain. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 477 (1964).[2] In such cases, Section 9(d), 29 U.S.C. 159(d),

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[2]This Court has recognized only two exceptions to the general rule that representation proceedings are unreviewable. Direct review in the district courts is warranted when the Board's action raises "public questions particularly high in the scale of our national interest because

provides for full judicial review of the underlying representation proceedings by providing that the record of those proceedings and the certification shall be included in the record required to be filed in the unfair labor practice case pursuant to Section 10, 29 U.S.C. 160. But "[u]ntil [the] election is held, there can be no certification of a bargaining representative and no Board order—based on a certification—* * * so as to invoke the court's powers under 9(d)." *NLRB* v. *Falk Corp.*, 308 U.S. at 459.[3]

Petitioner does not dispute the general proposition that courts lack jurisdiction to review Board decisions directing elections (Pet. 4-5). Petitioner contends, however, that jurisdiction that the Act otherwise withholds from a court of appeals arises whenever the Board directs a *second* election based on employer conduct that also forms the basis of

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of their international complexion," *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963), and when the Board has acted "in excess of its delegated powers and contrary to a specific prohibition in the Act." *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958). Petitioner concedes (Pet. 5 n.7) that neither of the exceptions is applicable to this case.

[3]As the Court made clear in *Boire* v. *Greyhound Corp.*, 376 U.S. at 477-478, the statutory policy of nonreview implements Congress's intent that representation issues be expeditiously resolved in order that collective bargaining rights be effectuated free from time-consuming, dissipating delays that would flow from direct judicial intervention. See also *American Federation of Labor* v. *NLRB*, 308 U.S. at 409-410 & n.2. Congress thus intended to postpone judicial review of election determinations until after the election has been held, a bargaining agent has been certified, " 'and the Board has ordered the employer to do something predicated upon the results of [the] election.' " *Id.* at 411 (quoting 79 Cong. Rec. 7658 (1935) (statement of Sen. Walsh)). Although this "indirect method of obtaining judicial review imposes significant delays upon attempts to challenge [representation rulings], * * * it is * * * obvious that Congress explicitly intended to impose precisely such delays" in order to provide speedy resolution of questions of employee choice by preventing the delay that would be caused by pre-election appeals. *Boire* v. *Greyhound Corp.*, 376 U.S. at 477-478.

an unfair labor practice order properly before the court for review. Petitioner's argument was correctly rejected by the court below, as it has been by every other court of appeals that has considered the issue.[4]

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[4]See, *e.g.*, *Raley's, Inc.* v. *NLRB*, 725 F.2d 1204, 1206 (9th Cir. 1984) (en banc); *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d 534, 542-543 & n.12 (3d Cir. 1983); *TRW* v. *NLRB*, 637 F.2d 410, 415 n.2 (5th Cir. 1981); *NLRB* v. *Intertherm, Inc.*, 596 F.2d 267, 278 (8th Cir. 1979); *NLRB* v. *Monroe Tube Co.*, 545 F.2d 1320, 1329 (2d Cir. 1976); *NLRB* v. *Auto Crane Co.*, 536 F.2d 310, 311 (10th Cir. 1976); *NLRB* v. *Styletek*, 520 F.2d 275, 277 n.2 (1st Cir. 1975); *American Bread Co.* v. *NLRB*, 411 F.2d 147, 156 (6th Cir. 1969); *Holly Hill Lumber Co.* v. *NLRB*, 380 F.2d 838, 840 (4th Cir. 1967); *Firestone Synthetic Fibers Co.* v. *NLRB*, 374 F.2d 211, 213 n.3 (4th Cir. 1967); *Daniel Construction Co.* v. *NLRB*, 341 F.2d 805, 808-810 (4th Cir.), cert. denied, 382 U.S. 831 (1965); *Hendrix Mfg. Co.* v. *NLRB*, 321 F.2d 100, 106 (5th Cir. 1963); *Bonwit Teller, Inc.* v. *NLRB*, 197 F.2d 640, 642 n.1 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953); *NLRB* v. *LaSalle Steel Co.*, 178 F.2d 829, 832 n.1 (7th Cir. 1949), cert. denied, 339 U.S. 963 (1950).

Petitioner concedes (Pet. 6 & n.8) that there is no conflict among the circuits on the question it asks this Court to review. Instead, petitioner merely cites (*id.* at 8 n.10, 9-10 & n.11) prior cases that either have been expressly or implicitly overruled or in which the representation orders were properly before the court pursuant to an unfair labor practice order entered upon an employer's refusal to bargain with a duly certified bargaining representative. See *Summa Corp.* v. *NLRB*, 625 F.2d 293 (9th Cir. 1980) (representation proceedings properly before the court on review of final order finding unlawful refusal to bargain following certification); *Anja Engineering Corp.* v. *NLRB*, 685 F.2d 292 (9th Cir. 1982) (expressly overruled in *Raley's, Inc.* v. *NLRB*, 725 F.2d at 1206); *Maremont Corp.* v. *NLRB*, 666 F.2d 1037 (6th Cir. 1981) (implicitly overruled by the court below (see Pet. App. 11a & n.7)).

In *NLRB* v. *General Telephone Directory Co.*, 602 F.2d 912, 920 (9th Cir. 1979), also relied on by petitioner (Pet. 8 n.10), the court reviewed a Board election order with no discussion of the jurisdictional issue addressed by the above-cited cases. *General Telephone* retains no force after the Ninth Circuit's decision in *Raley's, Inc.*, and has been generally discredited. See *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d at 543 n.14; *id.* at 547 n.6 (Garth J., dissenting).

As this Court explained in *NLRB* v. *Falk Corp.*, 308 U.S. at 456, a representation decision under Section 9 of the Act is "itself a distinct proceeding" even when undertaken in conjunction with an unfair labor practice proceeding under Section 10.[5] Accordingly, neither the Board's procedural decision to consolidate two such distinct statutory proceedings, nor the fact that the conduct at issue in both proceedings may be the same,[6] creates appellate jurisdiction over the representation proceeding. *Id.* at 458-459; see also *Raley's, Inc.* v. *NLRB*, 725 F.2d 1204, 1206 (9th Cir. 1984) (en banc); *Custom Recovery* v. *NLRB*, 597 F.2d 1041, 1046 (5th Cir. 1979) (quoting *Hendrix Mfg. Co.* v. *NLRB*, 321 F.2d 100, 106 (5th Cir. 1963)).

Guided by this well-established principle, courts that have considered the question presented by petitioner have held uniformly that the direction of a second election following an election tainted by an employer's unfair labor practice conduct is no more subject to direct review in the court of appeals than was the first election decision.[7] In

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[5]In *Falk Corp.*, the Court held that the court of appeals had no jurisdiction to review or modify a Board direction of election entered in conjunction with an unfair labor practice order finding that the employer had unlawfully interfered with its employees' right to choose by fostering and dominating a company union. The Board's direction of election excluded the company-dominated union from the ballot. *NLRB* v. *Falk Corp.*, 308 U.S. at 455.

[6]The fact that the same conduct is at issue for other purposes does not detract from the force of the congressional policy of avoiding the delay of pre-election review (see page 6 note 3, *supra*).

[7]See cases cited at page 7 note 4, *supra*.

Petitioner's attempt (Pet. 7, 13) to obtain review of the election direction here by characterizing it as a remedial portion of the unfair labor practice order is mere bootstrapping and is contrary to this Court's teaching in *Falk Corp.* As *Falk Corp.* makes clear, the mere fact that the Board chose as a matter of procedure to consolidate the representation and unfair labor practice proceedings or to issue its

neither case has a free election yet been held, a bargaining agent been certified, or an employer ordered to recognize and bargain with a union based on the certification. Absent a certification and a final unfair labor practice order stemming from an employer's refusal to recognize a certified union, there is simply no statutory jurisdiction regardless of the number of interlocutory election decisions that may be required because of the employer's unlawful conduct during the representation proceedings. See *NLRB* v. *Falk Corp., supra; TRW* v. *NLRB, supra; Hendrix Mfg. Co.* v. *NLRB, supra.*

Should the Board's direction of a second election in this case result in a certification and order to bargain, petitioner will be free to seek full judicial review of the representation proceedings in accordance with the scheme that Congress has fashioned.[8]

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rulings in a single decision does not serve to create appellate jurisdiction that was not granted by the Act. *Falk Corp.*, 308 U.S. at 459; see also *Raley's, Inc.* v. *NLRB, supra; Custom Recovery* v. *NLRB, supra.* There is no jurisdiction until the second election has been held and petitioner has been ordered to bargain "predicated upon the result of [that] election." *NLRB* v. *Falk Corp.*, 308 U.S. at 459.

[8]Petitioner's apparent contention (Pet. 13) that the court of appeals' failure to assert jurisdiction over the election decision in this case will create additional delays not contemplated by Congress lacks merit.

Petitioner cites as support for its contention the narrow category of cases in which the Board ordered an election based on unfair labor practice conduct in the first election and the court denied enforcement of the unfair labor practice order. See, *e.g., Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d 534, 543 (3d Cir. 1983); *NLRB* v. *Monroe Tube Co.*, 545 F.2d 1320 (2d Cir. 1976). In such cases, some judges have observed that judicial economy might be better served by a concurrent review of the election order, because, were the Board to conclude that a second election should nonetheless be held and were the union to prevail in that election, the employer, in response to a second refusal to bargain charge, would be likely to assert in the court of appeals the very same arguments that it had asserted against the first

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILFORD W. JOHANSEN
Acting General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board

MAY 1984

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charge. See *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d at 546-549 (Garth, J., dissenting), reh'g denied, 706 F.2d at 442-444 (Adams, J., dissenting from the denial of rehearing). The courts have held correctly, however, that such considerations do not create jurisdiction not granted by the statute and have noted further that the Board is free to reconsider its second election order in such cases. *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d at 543; see also *Raley's, Inc.* v. *NLRB*, 725 F.2d at 1206; *id.* at 1207 (Pregerson, J., concurring). In any event, the likelihood of delay and duplicative judicial proceedings is minimized where, as here, the court of appeals enforced the Board's unfair labor practice order in full.